

STATE BAR OF TEXAS
BANKRUPTCY LAW SECTION
NEWSLETTER

Spring/Summer 2005

Vol. 3, No. 2

**KURT EICHENWALD TO SPEAK AT BANKRUPTCY LAW
SECTION ANNUAL MEETING 2005**

You may be already aware that the Bankruptcy Law Section will be holding its annual meeting on Friday, June 24, as part of the Annual Meeting of the State Bar of Texas. What you didn't know, however, is that the speaker at the luncheon to follow our meeting will be Kurt Eichenwald, senior writer and investigative reporter for The New York Times and author of the recent best-seller, *The Conspiracy of Fools*. Mr. Eichenwald's appearance is made possible through the generous support of Bridge Associates LLP.

Although Mr. Eichenwald's remarks are likely to be the most exciting part of the meeting, there are a number of other good reasons to attend. It's the best way to find out what's going on and where the Section is heading. It is also the only chance you will get to vote on new propositions and the Section's leadership. And if that's not enough, members of the Section have put together a timely and topical educational program that will bring you up to date on major issues and earn you CLE credit. The program, which is free (except for your basic registration fee for the State Bar Annual Meeting--sorry, we can't change that), will begin with sessions of general interest and then divide into our Business and Consumer Committees for two more focused sessions.

The luncheon with Mr. Eichenwald will follow the educational program and will also serve as our opportunity to honor those who have made significant contributions to our Section and our practice in the past year. The cost of the luncheon is \$35 for an individual ticket, or if you're in a philanthropic mood, \$600 for a table of ten.

There is still time to sign up for this exciting program. The Section's meeting, along with the State Bar's Annual Meeting, will be held in Dallas at the Loew's Anatole Hotel. You should have received a mailing from the State Bar with a complete list of the activities available at the Annual Meeting, including our Section's meeting, but if you lost it or tossed it, you can still register on-line. Just go to the State Bar website (<http://www.texasbar.com/>) and click on the box that says "Annual Meeting - Click here to register." For your convenience, we have set out on page 6 the complete schedule for the Section's meeting. You won't want to miss this excellent opportunity to participate in building our Section, meet with friends, and add to your CLE hours--and you really won't want to miss Kurt Eichenwald, author of *The Conspiracy of Fools*. Mr. Eichenwald will sign copies of *The Conspiracy of Fools* following the luncheon. See you in Dallas on the 24th!

KURT EICHENWALD

Kurt Eichenwald, a senior writer and investigative reporter at The New York Times, has written about corporate corruption and related topics for more than a decade. He began reporting for the paper's business section in 1988, covering Wall Street, corporate takeovers and the insider trading scandals. In 1992, he began writing the "Market Place" column and covering the unfolding scandals at Prudential Securities. In February 1995, Mr. Eichenwald began covering a range of investigative projects for the business section.

Mr. Eichenwald was a 1996 winner of the George Polk Award for his articles about deficiencies in the American system of dialysis care. In 1998, he won a Polk Award again for a series of articles about allegations of corruption at the nation's largest private hospital chain, the Columbia/HCA Healthcare Corporation. That same year, he was selected for The Times's prestigious Senior Writer program. In 2000, he was finalist for a Pulitzer Prize for a series of articles about how business interests were influencing the system for medical clinical trials.

His first book "Serpent on the Rock" (Harper Collins, 1995) is about the Prudential Securities scandal. Mr Eichenwald's second book, "The Informant: A True Story" (Random House, 2000), is about the Archer Daniels Midland price-fixing case and was a finalist for a J. Anthony Lukas Prize and the Investigative Reporters and Editors Book Award. It is currently in development as a major motion picture directed by Steven Soderbergh. His most recent book, "The Conspiracy of Fools" (Boadway, 2005), is about the Enron scandal.

Inside in this Issue . . .

<i>Bankruptcy Law Section of the State Bar of Texas Annual Meeting 2005</i>	1
<i>Kurt Eichenwald</i>	1
<i>Call for Articles, Calendar Events and Troop Movements</i>	2
<i>Ongoing Mortgage Payments Trough the Debtor</i>	3
<i>Troop Movements</i>	5
<i>State Bar of Texas, Bankruptcy Law Section Annual Meeting Schedule of Events</i>	6
<i>Calendar of Events</i>	7

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.

The Case for Making Ongoing Mortgage Payments Directly by the Chapter 13 Debtor

by Deborah B. Langehennig, Chapter 13 Trustee

EDITOR'S NOTE: The following is the first installment of a point-counterpoint discussion of the relative merits of making mortgage payments through the trustee in a Chapter 13 case. Debbie Langehennig, one of our distinguished Chapter 13 trustees, makes the case that the increasingly common practice of making mortgage payments through the trustee fails to address the underlying problems and may actually be counterproductive to the financial education of the debtor. In our next issue of the newsletter, another of our Chapter 13 trustees, will argue the other side of the issue. Debbie and Robert Wilson will also be presenting this topic as part of a panel discussion at the Section's first annual Bench/Bar Conference on June 2, 2005. We would be most interested in any feedback our reader may have on this intriguing issue. Send your opinion by e-mail to eguffv@deweyballantine.com.

*"Give a man a fish and you feed
him for a day;
teach a man to fish and you feed
him for a lifetime."*

This article is intended to offer a counterpoint to the current trend of placing the disbursement of ongoing mortgage payments in the hands of the Chapter 13 trustee. Two key benefits are cited by most proponents of this trend: (1) increased Chapter 13 completion rates; and (2) reduction of the courts' stay relief dockets. Proponents of this method of mortgage payment place a tremendous amount of emphasis on the elevated completion rate for cases in which the trustee has made the ongoing mortgage payments. A high case completion rate reflects well upon the bankruptcy system. The entry of a discharge order in a Chapter 13 case means that the debtor has done everything he proposed to do

in the plan of reorganization. The discharge order also heralds the beginning of the debtor's fresh start, which is intended to be the goal of the bankruptcy filing. Many within the bankruptcy system, from Congress to the Trustees' Education Network and individual trustees, want this fresh start to have substance. Tremendous strides have been made in improving the quantity and quality of educational material available to the debtors. These improvements were made on a voluntary basis with the goal in mind that debtors should learn to manage their finances while they go through bankruptcy, so that they can avoid reentering the system through a revolving door.

The purpose of this increased emphasis on debtor education is to ensure that debtors benefit from their bankruptcy filing in the manner that Congress intended. It does no good if the only lesson a debtor learns is that bankruptcy is a financial crutch that makes up for a shortfall in planning. The courts are vocal on this point as well. "It would serve little purpose to require the Debtors to disburse their mortgage payments through the Trustee (and to pay the trustee's statutory commission thereon) during the Plan, only to have to arrange to make direct mortgage payments upon the termination of the Plan." *In re Aberegg*, 961 F.2d 1307, 1310 (7th Cir. 1992). The concern is that, by placing the trustee in a role traditionally reserved for the debtor, we are eroding the effectiveness of the fresh start and undoing the great work accomplished by the proponents of debtor education.

The data do not support the

concept that mortgage payments made through the trustee will indeed increase the successful completion rate of Chapter 13 cases. In an American Bankruptcy Institute Journal article by Gordon Bermant and Ed Flynn, the authors analyze data from trustee operations across the country in which the trustee makes the ongoing mortgage payment. The authors conclude that "[t]he comparison ... does not support the conclusion that moving the ongoing mortgage payments through the trustee operation increases the rate of successful terminations. . . . The proportion of successful terminations remains approximately 30 percent." Bermant and Flynn, *Chapter 13: Who Pays the Mortgage?*, 20 Am. Bankr. Inst. J. 20, June 2001. Most Chapter 13 trustees and debtors' attorneys recognize that the much simpler requirement of a wage order significantly and demonstrably increases the likelihood of successful plan completion.

LIABILITY AND VIABILITY

Aside from the philosophical concerns of retarding the development of a debtor's financial skills, the impact of which would be determined over time, the system propounded would have an immediate effect on the operations of the standing trustees. First, it will create additional expenses in that the trustees will need to hire and train more staff members in order to monitor payments, review payment histories, and maintain a steady stream of calculations as the escrow accounts jump up and down. The cost for additional staffing, postage, and other such items will be borne by an increase in the percentage charged by the

trustee. Proponents of mortgage payments by the trustee point out that this cost can be spread out over the caseload and actually reduce the overall percentage in conjunction with the increased volume of cash upon which the trustee draws the percentage. It does not seem possible, however, to avoid having the unsecured creditors bear the brunt of the costs of the initial establishment of this system. Even though the trustee fee may decrease over time, the overall cost to the system will be much greater when that fee is applied to a much larger pool of disbursements.

The standing trustees will also be forced to purchase additional bonding and insurance coverage, due to the increased risk for error and the undefined role of the trustee under the new system. For instance, what will determine the scope and breadth of the trustee's duties with regard to mortgage payments? The trustee is charged with reviewing the lender's payment history prior to commencing payments. What if the payment history or the loan documents reveal obvious flaws under which suit could be brought for damages or the lien invalidated altogether? The trustee is not an advocate for the debtor, nor is the trustee an adversary to the creditor.

The trustee is not an agent of the debtor but, rather, manages estate funds for the benefit of creditors. That role is established by plain meaning of 11 U.S.C. § 323, as well as its legislative history and the cases construing it. In the trustee's role as defined by Congress and case law, the trustee acts in a quasi-judicial capacity and enjoys a certain amount of immunity. It appears that this immunity may not apply once the trustee steps outside the realm of managing estate funds for the benefit of the creditors and begins managing funds for the benefit of the debtors. We could pretend, of course, that payment of the ongoing mortgage is for the benefit of the mortgagee-creditor. Such pretense, however, is sure to draw fire from the mortgage industry, as well as other secured creditors such as student loan

lenders or automobile finance companies who are receiving disparate treatment outside the Plan. Thus, it is a concern that the proposed system places the trustee outside the traditional role that has been graced with immunity.

PRACTICAL CONSIDERATIONS

There are a few practical scenarios that present problems in the execution of the system that deserve some consideration.

First, for the new system to work, debtors (and mortgage lenders) will have to move the first payment due after filing date into the arrearage portion of the mortgage to be paid under the plan. The debtor who has never missed a payment will be instantly harmed. The debtor who was behind prior to filing will be placed in even greater jeopardy if the case fails to obtain confirmation. Without including the first payment in the arrearage portion of the plan, it is "likely that mortgage companies will become entitled to postpetition late charges on payments of home mortgages by the Chapter 13 trustee." Lundin, *Chapter 13 Bankruptcy*, p. 138-11. "If the mortgage lender opposes this solution, it is doubtful it would pass legal scrutiny." Meyer and McDonald, *House Payments – Inside or Outside the Plan*, National Association of Consumer Bankruptcy Attorneys 2002 Convention. In those cases where the mortgaged property is owner-financed, a situation so common in Texas, we may unwittingly place the seller in the same financial bind as that of the debtor.

Secondly, consideration must be given to the instances that will arise in which the principal amount is paid to the lender, but insurance and taxes are paid directly to third parties. This would require the trustee to act as an escrow agent for the debtor, with a resultant instability in the plan payment amounts that may prove to be more daunting (for both the trustee and the debtor) than anticipated.

In addition, the trustee must take into consideration those instances certain to be encountered in which the debtor refinances the property during the course of the Chapter 13 case. Will the successor lender then be caught within the system, and, if so, what incentive or disincentive does the lender have to extend financing to the debtor? The same issues arise once more should a debtor wish to purchase a home during the case.

The answers to these scenarios will reveal whether the handling of mortgage payments through the trustee helps or hinders the participants in the bankruptcy system. For example, if we exclude a successor lender from having payments made by the trustee, have we potentially lessened the debtor's chance of case completion? If, on the other hand, we force the successor lender into the bankruptcy system as a premium for doing business with the debtor, have we now placed the debtor at a disadvantage in the marketplace?

If ongoing mortgage payments are placed inside the plan, do not all secured claims have to be inside the plan? Will all Chapter 13 debtors be able to afford the trustee fee on all ongoing and arrearage secured claims?

STAY RELIEF DOCKETS

Some articles focus on the reduction of the level of stay relief litigation that occurs after commencement of payments by the trustee. This is, of course, of great benefit to the courts as it frees the docket for other matters that require the court's attention. It is also of benefit to debtors and creditors as well, as it results in a reduction of legal fees on both sides. In turn, this means that debtors will not be strapped with additional financial burdens and will thus exit bankruptcy at an accelerated rate.

The reduction in stay relief litigation is due, it appears, to the trustee's ensuring that regular mortgage payments are made in accordance

with the terms of the debtor's note. The idea seems to be that the debtor is no longer forced to make the dreaded choice of whether to pay for food or housing. The reality is, however, that the debtor will instead be forced to make the choice between dinner or dismissal, which will affect all of the creditor parties and not just the mortgage company. The reduction in stay relief litigation may also be attributable in part to the fact that the debtor and creditor now have a third party looking over them and serving as a neutral party in any disputes over payment.

The articles favoring mortgage payments through the trustee present a "solution" that will stem the flow of stay relief litigation without touching upon the root of the problem itself. Payment through the trustee, while potentially providing a minor panacea, fails to strike at the very heart of these issues. Unless and until such time as we examine the problem we are attempting to solve, we will only create new problems for the standing trustees as well.

Ultimately, at its roots, the flood of stay relief litigation arises from a two-fold problem. Debtors do not make all of their mortgage payments, and they keep poor records. Likewise, mortgage lenders fail to credit all payments, and they keep records that appear to be written in hieroglyphics. Instead of fixing this problem, the proposed changes merely shift to the trustee the burden of making payments, keeping careful records while deciphering and decoding others, and making certain that everything adds up in the end.

This solution fails to provide debtors with the opportunity to develop any meaningful, lasting financial skills. It also fails to force the debtor to face the harsh reality of budgeting. Meanwhile, the secured mortgage lender is afforded disparate treatment while the trustee is placed outside of the traditional role of guardian of the unsecured creditors. Indeed, additional complications will arise when the debtor makes only a

partial plan payment. Is the amount of the partial payment to be applied first to the regular mortgage payment or to the plan? The trustee fee will be paid in any event, but the debtor attorney's fee may well be deferred to a subsequent month. This, in turn, also creates disparate treatment among the administrative claimants.

The solution to the stay relief problem is not to shift the burden. Instead, and in keeping with the intended ends of the Code, an attempt should be made to combine the responsibility of the debtor with the certainty and finality provided by the bankruptcy courts. These benefits can be obtained without creating the expense and uncertainty that will inevitably result from trustees making mortgage payments. For example, the courts or the trustees could require that debtors certify their compliance under the terms of their mortgage note by verified pleading, filed on twenty-days' negative notice, at an appointed time on an annual or semi-annual basis. Failing objection by the mortgage lender, this verification would bar the mortgage holder or servicer from asserting the existence of delinquency arising within the verified period. It could also allow the trustee to move for dismissal of the case when the debtor's verification contains noticeable instances of non-payment. Upon completion of the case, the discharge order could then certify that all required prepetition and postpetition payments have been made. Thus, the system could produce the same benefits of certainty and finality at a much lesser cost and, at the same time, bestow on the debtor a greater real-world financial education.

CONCLUSION

We should closely examine the genesis of the problems that we wish to solve before we attempt to initiate a resolution that, in the long run, may do more harm than good. Tremendous strides have been made through debtor education to give the debtors the knowledge and confidence they need to change their

lives. Having the trustees make the mortgage payments takes away from the accomplishments of the debtors.

In the final analysis, the decision should rest with each individual trustee and the court, according to the needs of the debtor community they serve.

Troop Movements

Annie Catmull of Houston has recently joined the firm of **McClain Leppert & Maney PC** and can be reached at 711 Louisiana Suite 3100, South Tower Pennzoil Place, Houston, Texas 77002

Rochelle, Hutcheson & McCullough, LLP have moved their offices to Republic Center, 325 N. St. Paul Street, Suite 4500, Dallas, Texas 75201. All telephone numbers will remain the same.

D. Wade Carvell, PC has left bankruptcy section of the Dallas office of **Winstead Sechrest & Minick** to join the offices of **Hoge & Gameros, LLP** (also in Dallas).

Michael Sutherland formerly of **Winstead Sechrest & Minick**, has joined the Dallas office of **Carrington Coleman Sloman & Blumenthal, LLC**.

Peter D'Apice, formerly a partner with **Andrews Kurth LLP** in Dallas, has joined **Stutzman, Bromberg, Esserman & Plifka, P.C.** in Dallas and can now be reached at 2323 Bryan Street, Suite 2200, Dallas, Texas 75201-2689.

David G. Adams has joined the firm of **Hermes Sargent Bates, LLP** and can be reached at 901 Main Street, Suite 5200, Dallas, Texas, 75202.

***State Bar of Texas Annual Meeting
Bankruptcy Law Section - Schedule of Events - June 24, 2005***

7:30a.m.-8:00a.m. Coffee Service
8:00a.m.-9:00a.m. Section Business Meeting: Charles A. Beckham, Jr.,
Chairman of the Bankruptcy Law Section.
9:00a.m.-9:45a.m. The Honorable Harlan "Cooter" Hale and Gerrit Pronske:
"Current Developments in Bankruptcy Law."
10:00a.m.-10:30a.m. Weldon Moore: "Tax Issues in Bankruptcy Cases"
10:30a.m.-11:00a.m. Betty Banks: "Consumer Credit Counseling Under the New Bankruptcy Code"

BUSINESS BANKRUPTCY COMMITTEE: Chaired by Berry Spears

11:00a.m.-11:30a.m. The Honorable Leif Clark and Mark Brannum: "Deepening Insolvency"
11:30a.m.-12:00p.m. Robert Medlin and Adam Dunayer: "Financial Advisor vs. Investment Banker"

CONSUMER BANKRUPTCY COMMITTEE: Chaired by Mervin Waage

11:00a.m.-11:30a.m. John Durkay: "Managing PDF Files in the Office and Courtroom."
11:30a.m.-12:00p.m. Dennis Olson: "The Bankruptcy Abuse Prevention and
Consumer Protection Act of 2005"

LUNCH: Kirk Eichenwald, speaker; sponsored by Bridge Associates LLP

**THE STATE BAR
OF TEXAS
BANKRUPTCY LAW
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
or contact Craig Yager
at (832) 325-4415

SAVE THE DATE!

**NATIONAL CONFERENCE OF
BANKRUPTCY JUDGES**

The N.C.B.J. will be holding its Seventy-Ninth Annual Meeting in San Antonio, November 2-5, 2005. So be on the lookout for more information, and get ready to show our visiting colleagues some real Texas hospitality!

2005 BANKRUPTCY SECTION CALENDAR OF EVENTS

JUNE

June 8, 2005

- **Event Name:** *Dallas County Bar Association Bankruptcy Meeting*

Location: Belo Mansion, Dallas, Texas

Topic: Judge Leif Clark, Judge Brenda Rhoades and former Judge Michael McConnell will be speaking on the significant amendments to the homestead exemption, and pre-bankruptcy planning under the new bankruptcy law

June 15, 2005 at 12:00 pm

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

Location: Houston Club

Topic: Mark Wege of Bracewell & Giuliani, LLP will be speaking about the business provisions of the new bankruptcy amendments

June 23-24, 2005

- **Event Name:** *State Bar of Texas Annual Meeting, 2005*

Location: Loew's Anatole Hotel, Dallas, Texas

June 28, 2005

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

Location: San Antonio Country Club

Speaker: Judge Glen Ayers (tentative)

June 29, 2005

- **Event Name:** *Nuts & Bolts of Business Bankruptcy (video)*

Location: Houston, Texas
Holiday Inn Select, Greenway Plaza

For more info, see: texasbarCLE.com

June 29, 2005

- **Event Name:** *Nuts & Bolts of a Collections Practice (video)*

Location: Dallas, Texas
CityPlace Conference Center

For more info, see: texasbarCLE.com

June 30 and July 1, 2005

- **Event Name:** *Advanced Business Bankruptcy Course 2005 (video)*

Location: Houston, Texas
Holiday Inn Select, Greenway Plaza

For more info, see: texasbarCLE.com

June 30 – July 1, 2005

Event Name: *2005 Consumer Bankruptcy Practice: Understanding and Working with the New Rules*

Location: Moody Gardens, Galveston, Texas (Video Replay: August 18-19, 2005, UT Law School, Eidman Courtroom, Austin, Texas)

Phone: (512) 475-6700

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.
1221 McKinney, Suite 2100
Houston, Texas 77010
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
1221 McKinney, Suite 2100
Houston, Texas 77010

Postage
Here

Affix Address Label Here