BANKRUPTCY LAW SECTION
STATE BAR OF TEXAS

Fall 2021 Newsletter

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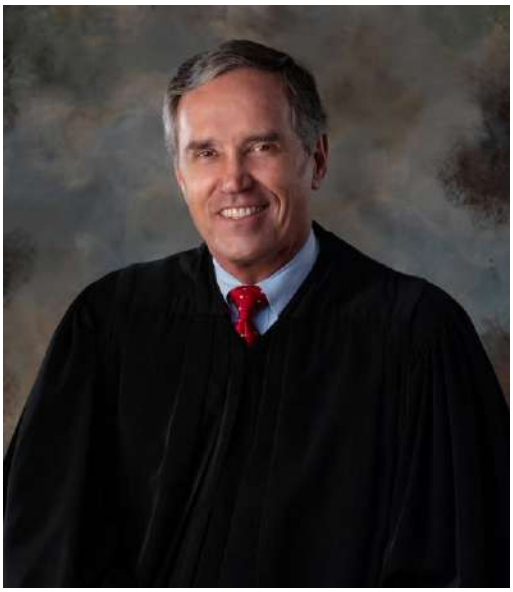
JUDICIAL SPOTLIGHT:

The Honorable Ronald B. King
♫♫NOBODY DOES IT BETTER [THAN JUDGE KING] AND [HE IS NOT] SO VAIN♫♫[1]

By: Eric Terry, Tony Hervol, and Abi Ottmers[2]



Quick Stats:

Hometown:	San Antonio, Texas
Undergrad:	SMU, High Honors, 1974
Law School:	UT Law, High Honors, 1977
Judicial Clerkship:	Justice James G. Denton, Supreme Court of Texas, 1977–1978
Private Practice:	Foster, Lewis, Langley, Gardner & Banack, Inc. (associate 1978–1982; shareholder, 1982–1988)
Judgeship:	Bankruptcy Judge for the Western District of Texas, 1988–present; Chief Judge Nov. 2006–present

This year, Judge Ronald B. King ("King"), Chief Bankruptcy Judge for the Western District of Texas, announced that he will be retiring from the bench. Judge King's retirement is effective November 1, 2021. Fortunately for all of us, he submitted a request for recall status, which has been approved by the Fifth Circuit Court of Appeals. Therefore, although he is retiring, Judge King will still be available to hear certain matters and assist the other Western District Judges as needed. In this article, we seek to highlight some of the main points in Judge King's amazing career and pay tribute to one of Texas' most-liked and admired United States Bankruptcy Judges.

King was born in San Antonio, Texas on August 16, 1953 to parents Donald Dick King and Elaine Baker King. His father dropped out of St. Mary's Law School because he had to support his growing family. His father said, "Ronnie, you (i) are going to go to law school; (ii) will be the longest serving Texas bankruptcy judge in history; and (iii) will handle over 75,000 bankruptcy cases." (he also said that the Berlin wall would fall; there would be an internet; a pandemic in 2020; and the Spurs would win their first championship in 1998 – the last prediction was incorrect because the Spurs didn't win their first championship until 1999).

[1] Referencing the songs by Carly Simon.
[2] Former law clerks for Judge King: Abi Ottmers 2002–2003; Eric Terry 1995–1996; Tony Hervol 1992–1993.

Whether his father said it or not, it happened.

"Judge King gained an excellent reputation for being a fair and very knowledgeable judge. I reviewed his work as a district judge and a circuit Judge on the 5th Circuit. He made my job of reviewing appeals from his court very easy. All the judges knew that if it was an appeal from Judge Ron King, chances were it was done correctly and was an easy affirmance."

The Honorable Edward Prado, former United States Ambassador to Argentina; former United States Circuit Judge of the United States Court of Appeals for the Fifth Circuit.

The Road to the Bench; From Folk Singer to Bankruptcy Law -- ♫I'm Going to Be Somebody♫[3]

King's teachers said he was smart, but maybe a little too social; he had to sit at the front of the room so they could keep an eye on him. His English teacher, ***Ms. Donna Peacock***, stated, "Judge King was Ronnie King when I first met him. He was twelve years old, cute, and smart; I was twenty-two, a first-year English teacher, and trying to seem smarter than my students. Ronnie and others got me through that first year with their patience, intelligence, and enthusiasm."

At Longfellow Junior High, King was a guitar-playing, folk-singing member of the First Acadian Folksingers, a group organized by Ms. Peacock that performed all over the city.

Judge King was active in numerous activities at Thomas Jefferson High School. He joined the tennis team, riding the city bus to the McFarlin Tennis Center every day during last period. He joined a garage band, which played at some gigs around town. He was a member of the "Senate," a men's social club, and he became president of the club his senior year. He attended many activities including sporting events and dances. ***In his senior year, he met a girl named Cindy Sauer who would later become his wife.***

Judge and Cindy King

Following a stellar undergraduate career at Southern Methodist University and then an equally stellar law school career at the University of Texas, Judge King served as a briefing attorney for Texas Supreme Court Justice James G. Denton. He returned to his hometown of San Antonio and became an associate at Foster, Lewis, Langley, Gardner & Banack, Inc., where he focused on business litigation and appellate law. By the time he became partner in 1982, he pictured his future career as an appellate lawyer, perhaps serving at some point on an appellate level court.

Judge King admits that he stayed away from the bankruptcy course at UT Law. He first ended up making an appearance at the bankruptcy court when a firm client needed bankruptcy advice, and Judge King was the only firm partner that knew where the bankruptcy courthouse was

[3] Referencing song by Travis Tritt.

located. From then on, he became the "go to" bankruptcy lawyer at the firm.

Building a bankruptcy practice from the ground up at a prestigious law firm in San Antonio was a daunting task. Judge King did not have any mentors or fellow attorneys with whom to brainstorm or strategize about difficult issues in his case docket. The bankruptcy bar in San Antonio at the time in the early 1980s was also very small, and newcomers sometimes found it cliquish. The entire Western District of Texas had only two sitting bankruptcy judges and had earned a reputation for being somewhat of a difficult place to practice. Regardless, with his hard work and self-study, Judge King flourished and developed a sizable bankruptcy practice to augment his already busy commercial litigation and appellate dockets.

When asked why he thought he would make a good judge, his answer was honest – "I thought I could do a good job at it and that I would be fair and objective." Judge King was appointed as a bankruptcy judge by the Fifth Circuit with his term commencing in October, 1988.

Mentor (and Family) to Many ♫I Hope You Dance♫[4]

Judge King purposefully employed many law clerks over the years – 37 to be exact. He believed he had a duty to mentor and educate young lawyers on the judicial system, the bankruptcy bench, and the practice of law in general. His clerks, generally recent law school graduates, could be found in Judge King's chambers acting as his counsel and absorbing every lesson he handed out. Any of his past 37 clerks will gladly describe their year with Judge King as a significant highlight of their professional life. Judge King freely talked through issues with his clerks, bantered about humorous matters that arose at hearings, and was also simply available to talk about daily life and all that it brings.

Judge King was a founding member of the Honorable Larry E. Kelly American Inn of Court, which emphasizes mentoring younger lawyers. As his wife ***Cindy*** states, "He has always loved working with and helping young lawyers, even in his days of practice, and adding a Bankruptcy Inn of Court chapter to the Western District of Texas was a goal that he determinedly worked toward and talked about during the better part of his judicial career. He is so proud of this success."

"Judge King is the gold standard. As he knows all too well, I've called on him my entire judicial career for advice on hard cases and he has never failed to return my call or email and to offer help. He is one of my mentors and he and his wife Cindy are among our closest friends."

- ***The Honorable Harlin DeWayne Hale***

2008 Law Clerk Reunion

[4] Referencing song by Lee Ann Womack.

The King Efficient Team ♫We are Family♫[5]

The Western District of Texas Bankruptcy Court became the first court in Texas, and one of the first in the nation, to move to a paperless docket on March 5, 2001. When Judge King was appointed in 1988, the judiciary, and most of the business world, was dominated by paper and burdened with the storage of paper files, and all of the organizational inefficiencies attendant to such files. In 1997, Judge King and former Chief Judge Larry Kelly formed a Strategic Planning Committee to explore the possibilities of electronic filing. They met with information technology professionals, judges, lawyers, and staff from other courts to discern what was available and what was necessary to move to electronic filing. The district adopted a recently developed system, made some additional improvements, and facilitated the transition to what has become a paperless Case Management/Electronic Case Filing system, or CM/ECF. Judge King directed meetings, attended trainings, and helped implement the CM/ECF platform for both court staff and lawyers within the Western District. **Most courts in the United States, both federal and state, have since followed the Western District's lead in electronic filing, using this system as a model in many cases.**

In addition to his law clerks, Judge King has had a loyal staff that has helped him (and the professionals and their clients) provide the paradigm for the most efficient court system. Mrs. Tricia Bade Haass served as Judge King's secretary for over thirty years. Tricia is smart as a whip, warm and kind, and has been a good friend to Judge King and his law clerks.

"I got the job of a lifetime, met a world of wonderful people, and gained a wealth of knowledge and experience."

- ***Tricia Haass***

Before her retirement in 2017, Mrs. Jana Brisiel served as Judge King's courtroom deputy for 29 years. Judge King is quick to credit Jana for her professionalism with the bar and her excellent organizational skills in keeping his court running smoothly. After Jana's retirement, Mrs. Deanna Castleberry filled Jana's big shoes and did so in perfect style.

"I had the best job one could ever ask for because of you, Judge. Our years together will always be a great memory."

- ***Jana Brisiel***

Civility in the Courtroom; Patience of Job

Judge King never liked incivility among the litigants or counsel. He always stressed the need to maintain professionalism among members of the bar. Yet, he recognized that few people were happy when they were in court and understood that anger was a byproduct of the stress and events that had brought people to bankruptcy court in the first place. Despite these challenges, which included being the subject of recusal motions and even a party litigant, Judge King maintained his ever-present cool demeanor. The authors have never seen him lose his temper – not in court, not in chambers, not ever – even when he had every reason to be angry. He has always epitomized civil judicial temperament – he listens to the arguments, examines the evidence, and rules accordingly. Quite frankly, as the lawyers

[5] Referencing song by Sister Sledge

who are reading this understand so well, this requires the patience of Job.

When asked what his favorite type of case is, Judge King smiled and immediately said, "the cases that pay creditors 100%." Judge King's mantra is that one of the primary purposes of bankruptcy is to pay creditors. Therefore, on the rare occasions when creditors are paid in full, Judge King noted that this was a homerun for the bankruptcy system.

Pearls of Wisdom – Be Prepared and the Golden Rule

To be successful in Judge King's court, lawyers are expected to be prepared. They are expected to know the law, the factual background, and the key issues in dispute. Lawyers are also expected to be direct and tell the Judge up front the relief they are seeking. He also added this bit of advice: ***"Don't ever lie or misrepresent anything to the judge, or even shade the truth. Your reputation for veracity is your most important asset. Don't forfeit it for one lousy client. This probably won't be your last case."*** As for younger lawyers, Judge King suggested that they "be collegial and respectful, not only to the Court and your colleagues, but the entire staff." As stressed by Judge King, being genuinely nice to the courtroom staff and treating everyone with respect is critical for a successful career.

Greatest Accomplishments and Other Passions

Judge King names his family as his greatest accomplishment. Judge King has been happily married to his high school sweetheart, Cindy Sauer King, for 46 years. They raised three amazing children – Kari King Dial, Ronald Baker King, Jr. (known as "Baker") and Kelsey Ann Copeland. Kari is a government relations attorney; she and husband, Chris, have a two-year old daughter. Kelsey is a litigation attorney; she and husband, Matt, have a four-year-old daughter. Baker is an anesthesiologist; Baker and his wife, Kelly, have two boys, ages 11 and 12.

"My dad has many outstanding qualities - intelligence, integrity, and great legs - but one of my favorite things about my dad is his sense of humor."

- ***Kari King Dial***

"His intelligence, humor, and composed nature certainly have helped him shine as a jurist – but I think what makes him stand out the most is his humility."

- ***Kelsey Copeland***

Judge King's schedule enabled him to be involved in his children's lives and numerous academic and athletic events including coaching/attending softball, baseball, basketball, soccer and track. He also has had a little time to play basketball. Despite sustaining several injuries on the court, Judge King continues to regularly play with several groups. He has certainly put his downtime to good use: relaxing with his family, spending time with his grandchildren, enjoying his family's annual deer lease, and sampling Texas' many great barbeque restaurants.

The King Family

A Judge for the Ages

Judge King leaves the bench, after more than 33 distinguished years, with an astonishing record. He is the longest serving United States Bankruptcy Judge from Texas in history. He has presided over more than 75,000 cases – including some of the largest and most significant cases in history.

What are People Saying About Judge King ♫ Something to Talk About ♫ [6]

We are including quotes from family and friends. The responses were overwhelming. We are creating a book of all of the quotes and presenting it to Judge King. Some of the following quotes may have been shortened for this article.

"In his remarkable career Chief Judge King has disposed of varied matters with grace, efficiency and wisdom. His contributions to the administration of justice are invaluable."

- ***The Honorable Xavier Rodriguez, United States District Judge for the Western District of Texas.***

"Judge King, (Ronnie), although there are no words to adequately describe how much all of us in the Bankruptcy world will miss you, please know that your honesty, dedication, and commitment have personally impacted me more than you will ever know."

- ***The Honorable Eduardo Rodriguez, United States Bankruptcy Judge for the Southern District of Texas***.

"I am sure I speak on behalf of everyone [law clerks] when I say that we all are better people and better lawyers for having spent that time with you. For me, it was truly life altering. I will never be able to do enough to thank you for your wisdom, guidance and mentoring."

- ***Michael Parker, United States Bankruptcy Judge Designate for the Western District of Texas.***

"I remember him as a wonderful leader as well as a fun-loving guy! I also recall great times singing folk songs when he was playing the guitar."

- ***W.E. Moerner, 2014 Nobel Prize Winner and former classmate of Judge King***.

"Ronnie King is a superb Judge and great colleague. It is hard to imagine the Western District without him."

- ***The Honorable Richard S. Schmidt, former United States Bankruptcy Judge for the Southern District of Texas.***

"He has been an outstanding Judge: at once cerebral and practical, always

[6] Referencing song by Bonnie Raitt.

respectful of those appearing before him, whether counsel, client or witness and whether from San Antonio or elsewhere. Truly 'a gentleman and a scholar.'"

- ***Ronnie Hornberger, Of Counsel, Plunkett, Griesenbeck & Mimari, Inc.***

"I emphatically believe that there is no better bankruptcy judge in the country than Judge King. He's the full package: intellect; common sense; business sense, affability; compassion; patience; and he always has a backbone when somebody needs to be dealt a tough consequence."

- ***The Honorable Stacey Jernigan, United States Bankruptcy Judge for the Northern District of Texas.***

"Judge King is widely respected by his colleagues as a serious yet friendly man, an intellectual stalwart yet practical jurist, an elite yet welcoming talent. Judge King is a credit to his family, his hometown and to the nationwide bench. He will be sorely missed by one and all."

- ***The Honorable Daniel Collins, United States Bankruptcy Judge for the District of Arizona.***

"The judicial code of conduct for Federal judges admonishes judges to be patient, dignified, respectful and courteous. Those four adjectives describe Judge King perfectly – in the way he interacts with lawyers and witnesses in the courtroom, the way he interacts with his judicial colleagues, and the way he acts at bar functions and Inn of Court Events. When I first appeared before Judge King in the multi-hundred-million-dollar Insilco case, I had the experience of appearing before dozens of bankruptcy judges from San Diego to New York and many points between. And yet of all those judges, I thought then and now that Judge King was the one who exhibited and exhibits the perfect judicial demeanor. As a young lawyer, I found his courtroom to be an inspiring place to try cases. As a new judge, I looked to Judge King as my model. And, in considering my experience with Judge King, I see that a vital and enduring part of his considerable legacy will be all the law clerks, lawyers, and fellow judges who he inspired with the example of his exemplary conduct."

- ***The Honorable Tony Davis, United States Bankruptcy Judge for the Western District of Texas.***

"Professionally, I have admired Judge Ronnie King for decades for his even judicial temperament, who rules thoughtfully and fairly, taking into consideration the big picture of a case, and adhering to the rule of law. Everyone in his courtroom is treated equally."

- ***Beth Smith, Owner, Law Offices of Elizabeth G. Smith.***

"Since his appointment in October 1988, 33 years ago, Chief Bankruptcy Judge King has served with honor and distinction setting the gold standard for judicial service: honor, integrity and competence with a commitment and passion for the rule of law. The judiciary of the Western District will forever be grateful for his service."

- ***The Honorable Orlando L. Garcia, Chief United States District Judge for the Western District of Texas.***

"Over the years, I enjoyed appearing before Judge King as a lawyer because he was always fair, considerate, and exhibited the gold standard for judicial temperament. Then, as a judicial colleague, I so appreciated Judge King because of his mentoring spirit and thoughtful counsel. Most importantly, however, I am blessed to call Ronnie King my friend because of his example – he is deeply devoted to his faith and his love for his bride Cindy and their kids and grandkids. All that . . . and he still has all his hair -- unbelievable!"

- ***The Honorable Mark X. Mullin, United States Bankruptcy Judge for the Northern District of Texas.***

"If you asked attorneys to describe Judge King, you would generally receive a few consistent themes. He is patient. He lets you try your case, generally without interruptions. You might also get agreement that Judge King thinks that many of us can be (shall we say) a bit dramatic. To quote 'Counsel, there is no jury here.' He rarely shows irritation – in fact, his poker face is legendary."

- ***Deborah Williamson, Member, Dykema.***

"Even in particularly adversarial matters, Judge King has always patiently given each party their opportunity to state their case, meritless or not. I don't think that any individual who ever appeared before Judge King can honestly say that she or he didn't 'have her or his day in court.' We will miss seeing Judge King in court on a regular basis but will always appreciate his service to the community!"

- ***Bill Kingman, Owner, Law Offices of William B. Kingman, PC.***

"When you appeared before Judge King, you always knew that you were going to be treated fairly and that your client would have ample opportunity to present his case to a judge that would listen and was patient, courteous, firm and without bias. He and his staff have always been very 'user friendly' and after decades of service he had an appropriate judicial temperament and the ability to quickly recognize complex legal issues. Trying cases before him was a highlight of practicing bankruptcy in San Antonio."

- ***David Gragg, Shareholder, Langley & Banack, Inc.***

What Texas Bankruptcy Judges Wish You Knew About Virtual Hearings

By: Bankruptcy Section YLC Members Joseph D. Austin, Audrey Hornisher, Maegan Quejada JH Rogers, Sahrish K. Soleja, and Steffen R. Sowell*

It's been a while since we've transitioned to primarily virtual bankruptcy hearings, but Texas bankruptcy judges have shared that there is still some confusion about current court procedures. To help the Texas bankruptcy bar navigate the different procedures and avoid appearing as a cat, members of the Young Lawyers Committee interviewed judges, reviewed each court's rules, and compiled this guide. While this article is focused on virtual hearings, note that the Texas bankruptcy courts may conduct in-person or hybrid hearings under certain circumstances.

The following chart provides a summary of the information you need for virtual hearings. Remember to always check each judge's procedures to make sure you are aware of any judge-specific requirements, especially when it comes to hearing exhibits. Many, if not all, judges are willing to host training sessions on their respective virtual hearing platforms. It's a great way to not only make sure you are familiar with the platform before your hearing, but also to ensure that your firm's firewall doesn't prevent you from connecting to a hearing.

Topic	Bankr. E.D. Tex.	Bankr. N.D. Tex.	Bankr. S.D. Tex.	Bankr. W.D. Tex.
Virtual Hearing Platform(s)	Microsoft Teams	WebEx	Video: Go To Meeting Audio: Conference Line	WebEx
Link to Platform Guide	See Judges' info. and procedures	See Judges' hearing dates and calendar webpages	N/A	https://www.txwb.uscourts.gov/txwbvirtualhearings
Exhibits	File on CM/ECF	File on CM/ECF	File on CM/ECF	Marked and bound exhibits sent to chambers
COVID procedures and updates	https://www.txeb.uscourts.gov/covid-19-update-and-court-operations	https://www.txnb.uscourts.gov/sites/txnb/files/news/General%20Order%2021-06%20Signed_2.pdf.	https://www.txs.uscourts.gov/bankruptcy/genord	https://www.txwb.uscourts.gov/standing-orders-index
Judges' info and procedures	https://www.txeb.uscourts.gov/judges-info	https://www.txnb.uscourts.gov/judges-info	https://www.txs.uscourts.gov/page/bankruptcy-judges-procedures-schedules	https://www.txwb.uscourts.gov/judges-information

* Joseph Austin is an associate at Kelly Hart & Hallman LLP in Fort Worth; Audrey Hornisher is an associate at Clark Hill PLC in Dallas; Maegan Quejada is an associate at Sidley Austin LLP in Houston; J.H. Rodgers is an associate at Cavazos Hendricks Poroit, P.C.; Sahrish Soleja is an associate at Gray Reed & McGraw LLP in Dallas; and Steffen Sowell is an associate at Winstead PC in Houston.

I. Eastern District of Texas

Contributed by Sahrish K. Soleja & Steffen R. Sowell who interviewed Judge Rhoades and Judge Searcy

Like most federal courts, the Bankruptcy Court for the Eastern District of Texas has also implemented temporary emergency procedures to adapt to the COVID-19 global pandemic and continuing evolving circumstances. The Eastern District closely follows CDC guidelines and requires masks and social distancing for all in-person hearings. We've summarized the qualitative measures that parties should be cognizant of when practicing in the district.

The Eastern District uses Microsoft Teams as the platform for all telephonic and videoconference hearings. For now, most consumer and business dockets are held virtually. All witnesses must appear using their own device or a device provided by their attorney. For contested matters, witnesses may not be in the same room as their attorney or any other witness. Exhibits must be filed on the docket separately; however, if the hearing is held in person, the parties must bring hard copies for the court.

The following are Judge-specific guidelines:

Judge Rhoades

- All hearings are scheduled telephonically. If the parties want a hearing by videoconference or in-person, they must request it.
- Contested matters and trials are held by videoconference.
- Do not send a hardcopy of exhibits to chambers unless instructed otherwise.

Judge Searcy

- All hearings are scheduled to be heard by videoconference. If the parties want a telephonic or in-person hearing, they must request it.
- Contested matters and trials are held in person.

Practitioners are strongly encouraged to refer to the applicable General Orders, local rules, and judge-specific rules, which can be accessed at: https://www.txeb.uscourts.gov/judges-info. As officers of the court, counsel should continue to uphold and observe the formality and decorum of the court.

II. Northern District of Texas

Contributed by Joseph D. Austin who interviewed Judge Larson

Recently, the Bankruptcy Court for the Northern District of Texas ("NDTX") issued *General Order 2021-06 regarding Continued Court Operations During COVID-19 Pandemic*.[i] The General Order provides guidance with respect to which hearings will be held remotely, in person, or in a hybrid mode and applies to all judges sitting in Fort Worth and Dallas. WebEx is the exclusive virtual platform for all remote hearings. Page 5 of the General Order also contains the WebEx meeting links and teleconference information for Judges Hale, Jernigan, Mullin, Morris, and Larson.

All of the following will be **remote hearings only** with no in person attendance:

1) Hearings in Complex Chapter 11 Cases;
2) "First-Day" hearings in all types of Chapter 11 Cases;
3) Hearings set on the Chapter 13 Trustees' monthly docket;
4) Preliminary hearings on Motions to Lift the Stay;
5) Hearings on Motion to Extend or Impose the Stay; and
6) Hearings set on an emergency basis.

In-person hearings in which **no remote attendance** is permitted include all hearings and trials in adversary proceedings and final hearings on Motions to Lift the Stay. **All other hearings** not specifically mentioned in the General Order will be conducted by the Court in a hybrid mode where participants may attend either in person or remotely. Separately, Judge Jones issued a Memo for hearings in Lubbock, Amarillo, Abilene, and San Angelo Divisions;[ii] however, due to the rising number of COVID-19 cases, all hearings before Judge Jones are conducted remotely via WebEx.

A. Decorum

While WebEx hearings often feel more informal than appearing in person, hearings should be given the proper deference and courtroom attire should always be worn. In addition, counsel should not double book themselves and "hop on and off" of a WebEx hearing. At a minimum, if counsel has a scheduling conflict, counsel should inform the Court in advance. Also, all courts encourage parties to have a test run with your witness to ensure their technology is fully functioning and that the witness has access to all exhibits that may be the subject of direct and cross examination.

B. Exhibits and Witnesses

For all hearings conducted remotely or in a hybrid mode, exhibits must be filed on the docket of the case, or adversary proceeding, by the date the exhibits are required to be exchanged pursuant to the Court's local rules or any entered scheduling order. Demonstrative aids such as PowerPoints should also be filed on the Court's docket; however, for voluminous exhibits, attorneys should consult each judge's specific guidelines or contact the courtroom deputy regarding sending an exhibit notebook or electronic file in advance of the hearing. Each judge's procedures are different and provide great insight into each judge's preferences. For example, Judge Larson always requires two exhibit binders for all hearings (in person or remote). If exhibits exceed 100 pages, Judge Morris requires two sets of binders delivered 24 hours in advance of all remote and hybrid hearings. While screen sharing is an option with WebEx, most judges prefer parties have physical copies of exhibits in front of them to allow for smoother witness questioning as opposed to on their computer, which can distract from the overall hearing format.

Judges prefer witnesses turn on their video at all times when being questioned. At times, judges may instruct witnesses to turn off their video, but only for bandwidth issues to ensure the record is as clear as possible. Hard copies of exhibits should be sent to a witness ahead of time. Preferably, a witness will also have a binder of the exhibits ahead of time. All judges accept and encourage proffers provided the witness is on WebEx and subject to cross-examination. If an

attorney will be reading a lengthy affidavit as a proffer, judges encourage attorneys to file the proffer as an exhibit prior to the hearing.

C. Changes to Procedures

Currently, there are no discussions of amending either the General Order or Memo, but if there are any changes for hearing procedures for any of the Courts in the NDTX, an email alert will go out to all ECF filers regarding any changes. While the above documents provide guidance on which hearings will be in-person or remote, all judges will be flexible to accommodate witnesses' and attorneys' needs, especially for uncontested matters during the pandemic. The main priority should be to communicate with the judge's courtroom deputy in advance of the hearing if a hearing needs to change from in-person to remote or vice versa.

III. Southern District of Texas

Contributed by Audrey Hornisher who interviewed Judge Lopez

When preparing for a hearing in front of the Southern District of Texas Bankruptcy Court, there are a few key procedures and protocols to remember.

First, all hearings will be hybrid unless ordered otherwise by the Judge or agreed to by the parties. A hybrid hearing means that each participant (*i.e.*, judge, attorney, witness) may appear virtually or in person. Notably, a judge may require the parties to appear in person, but advanced notice will be provided. Additionally, parties can stipulate to a virtual hearing and file the stipulation with the court.[iii]

Second, when appearing virtually, a notice of hearing required under 9013-1(c) should include the following:

> There will be a hearing on this motion on [date] at [time] in courtroom _____, [address]. You may attend virtually or in person. To attend virtually, you must connect by separate audio and video connections. The audio connection is 832-917-1510. The code is _____. The video connection is at GoToMeeting.com. The Code is _____. The Court recommends that you download the free GoToMeeting app.

Third, as indicated in the notice of hearing, when appearing virtually the participant will use GoToMeeting.com for the video connection and dial-in via a telephone for the audio connection. The courts strongly encourage participants to download the free GoToMeeting.com application before the hearing. For audio, if the Judge has muted all lines, remember to hit 5* once to "raise your hand" and that will let the Judge know you'd like to be unmuted. For certain complex cases, appearances are taken electronically and may be submitted up to 10 minutes in advance of a hearing on the respective Judges' procedures page.

Fourth, regardless of whether the hearing will be held virtually or in person, all exhibits must be filed on the CM/ECF docket sheet, with each exhibit filed as a separate attachment to the exhibit list. During the hearing, the exhibits should be offered and referred to by their CM/ECF docket number.

Fifth, the courts do not take a position on proffered testimony, and it is up to the attorney's choice whether to offer a witness' testimony by proffer. When considering the format of testimony, an attorney may want to evaluate the location of the participants—*i.e.*, the witness may be virtual via GoToMeeting.com, while the attorney or judge attends in person.

Finally, per General Order 2021-8, the Southern District of Texas Bankruptcy Court will remain virtual until November 8, 2021. Details regarding the court's reopening should be released mid-October 2021. The best method to receive updates on the current procedures and protocols is to review the court's General Orders at https://www.txs.uscourts.gov/bankruptcy/genord.

IV. Western District of Texas

Contributed by JH Rogers who interviewed Judge Mott

The Western District of Texas Bankruptcy Court is currently operating under the standing order issued on June 15, 2021 that may be accessed on the court's website. Under the order, all proceedings are held either in-person, via WebEx video meeting, by teleconference, or a combination of the methods. The best resource to monitor changes is by visiting the Court's website.

When attending in person, all mask and vaccine requirements are posted at the public entrance of each facility. When appearing via WebEx, parties may access the virtual courtroom guidelines on the court's website.

A. Important rules/tips for WebEx participation are as follows:

- Avoid using speakerphone; Earbuds or a headset are preferred
- Mute when not speaking
- State your name before you speak
- Speak slowly and clearly
- Raise hand or wave instead of interrupting
- Recording the hearing is prohibited
- Log-in at least 15 minutes before the hearing
- Clients should be instructed on how to use WebEx before (not during) the hearing
- Attire should be appropriate for a courtroom

B. Exhibits for WebEx Hearings

- Marked and bound copies should be provided to the court unless Judge or Courtroom Deputy permits exhibits to be sent to court via email or filed with the exhibit list
- WebEx allows for sharing of documents by using the share icon at bottom of screen
- Contact courtroom deputy well in advance if electronic exhibits are to be used

C. Witnesses

- In a contested setting, witnesses must appear by video
- If not contested, witnesses may appear by telephone

V. Virtual Hearings are Here to Stay

For the most part, Judges have been pleased with the implementation of WebEx hearings. In fact, remote hearings for some matters are very likely to be permanent procedure, even in a post-COVID world. Judge Larson has explained that she has seen particular benefits for routine non-evidentiary matters. For example, in uncontested motions to extend the automatic stay, a debtor is able to attend remotely and not have to take time off work. Judges in the Southern District also expect Chapter 13 panels to continue to be held virtually; however, the consensus among judges and attorneys is that contested hearings that involve voluminous exhibits or where witness credibility is at issue need to be held in-person.

Attorneys should plan to maintain their webcams and audio equipment, and should consider buying a coffee mug that says, "You're on Mute." These items would all be excellent investments! To stay apprised of the most recent procedures of each district, bookmark the Bankruptcy Section's COVID resources page: http://statebaroftexasbankruptcy.com/COVID-19-Legal-Resources-&-Updates.

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[i] The General Order is available at https://www.txnb.uscourts.gov/sites/txnb/files/news/General%20Order%202021-06%20Signed_2.pdf.

[ii] The Memo is available at https://www.txnb.uscourts.gov/sites/txnb/files/hearings/2021%20Updated%20Hearing%20Procedures%20for%20LBB%2C%20AMA%2C%20ABI%2C%20SAN%20%282%29.pdf.

[iii] *See* Ex. B to General Order 2021-5.

SUPREME COURT SPOTLIGHT

Equitable Mootness: Supreme Court Has Opportunity to Resolve Circuit Split

By: JH Rodgers and Leah Duncan*

The equitable mootness doctrine examines "whether it would be equitable or prudential to reach the merits of a bankruptcy appeal" after a confirmed plan has been substantially consummated.[i] This doctrine is invoked by Article III courts when unwinding a plan would prejudice an innocent third party.[ii] In other words, if parties have already acted in reliance on the reorganization plan, Article III courts can refuse to hear an appeal to protect the interests of those parties.[iii] As the equitable mootness doctrine has developed, courts have found that reversal of confirmed plans could "create an unmanageable, uncontrollable situation for the Bankruptcy Court."[iv] "'[E]very Circuit Court has recognized some form of equitable mootness,' save the Federal Circuit (which does not hear bankruptcy appeals)."[v] After a plan of reorganization has been confirmed and implemented, courts of appeals are reluctant to disturb the effect of the confirmed plan absent "compelling reasons."[vi] Several recent decisions have questioned whether equitable mootness may be more likely to promote uncertainty and delay rather than its intended goal of promoting finality.[vii]

In August 2021, the Eighth Circuit, in *VeroBlue Farms USA, Inc.*, held that equitable mootness was improperly invoked by the lower court.[viii] There, when the debtors filed for chapter 11 relief, Alder Aqua (the "Plan Sponsor"), became the sole shareholder of the reorganized debtors and assumed management of the debtors.[ix] After confirmation of the plan, the Plan Sponsor funded the plan and released the claims it had against the debtors.[x] FishDish, one of the debtors' preferred shareholders, appealed the denial of its objection to confirmation of the plan.[xi] The district court dismissed the appeal, invoking the equitable mootness doctrine.[xii] FishDish then appealed to the Eighth Circuit, which determined that the district court should have decided the merits of the appeal and criticized the district court's reliance on the equitable mootness doctrine without it determining the merits of the appeal first.[xiii] The opinion ended with a caution that if equitable mootness became the rule of appellate bankruptcy jurisprudence, rather than an exception, the U.S. Supreme Court may step in and possibly abolish the doctrine altogether.[xiv] Now, the Supreme Court has that opportunity with two pending Writs of Certiorari from cases out of the Second and Third Circuits.

In January 2021, in *In re Nuverra Environmental Solutions, Inc.*, the Third Circuit affirmed the district court's holding that an appeal of the confirmation order was equitably moot.[xv] Nuverra's plan treated classes of unsecured creditors differently.[xvi] Pre-bankruptcy, Nuverra issued approximately $40 million worth of notes, and its plan replaced the pre-petition notes with securities and cash.[xvii] This treatment resulted in note holders only receiving six percent of the note's face value.[xviii] David Hargreaves ("Hargreaves") held one of these notes in the approximate amount of $450,000.[xix] Hargreaves objected on the grounds that this treatment discriminated

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unfairly against unsecured creditors because other unsecured creditors, such as trade creditors, would receive one hundred percent of their claim compared to his six percent.[xx] The court reasoned that Hargreaves' appeal was equitably moot because the plan was substantially consummated, and, although granting Hargreaves relief would not fatally unscramble the plan, the relief requested would violate 11 U.S.C. § 1123(a)(4).[xxi] The court affirmed over the strongly worded concurring opinion of Judge Krause. Judge Krause did not agree with the court's reliance on equitable mootness, stating it was an "ill-advised expansion of the doctrine."[xxii] By denying the appeal on equitable mootness grounds, the court was able to avoid considering other substantive arguments of the case. Judge Krause argues that equitable mootness "has lured [the court] into abdicating [the court's] jurisdiction when [the court] should be exercising it, and 'stunt[ing] the development' of our bankruptcy jurisprudence when it's [the court's] duty to promote it."[xxiii] Hargreaves has now petitioned the Supreme Court for cert. and takes the position that equitable mootness is inconsistent with the federal courts' "virtually unflagging" obligation to hear and decide cases within its jurisdiction.[xxiv]

Similarly, in February 2021, the Second Circuit denied a creditor's appeal of an order authorizing a debtor to pay certain prepetition critical vendors based on equitable mootness in *GLM DFW, Inc. v. Windstream Holdings, Inc.*[xxv] Windstream Holdings, Inc. and its affiliates and subsidiaries ("Windstream") filed for Chapter 11 relief. GLM DFW, Inc. ("GLM"), a Dallas based company, provided waste management services for Windstream.[xxvi] The debtor requested authority to pay creditors that it designated as critical vendors (the "Motion").[xxvii] GLM was not designated a critical vendor and objected to the Motion on the grounds that the court essentially rubber-stamped Windstream's proposed list of critical vendors and the court should have done a separate analysis to determine which creditors would be included as a critical vendor.[xxviii] GLM also argued that Windstream should have been required to publicly disclose the list of critical vendors.[xxix] The bankruptcy court overruled GLM's objections and granted the motion. GLM appealed the order to the district court, raising the same objections, and the district court affirmed the bankruptcy court's ruling. GLM then appealed to the Second Circuit, and, while the appeal was pending, Windstream's plan of reorganization was confirmed. The Second Circuit did not address GLM's objections and instead analyzed the appeal under the doctrine of equitable mootness.[xxx] The court stated that there is a presumption that an appeal is equitably moot when a plan has already been substantially consummated, and to overcome that presumption, a party must demonstrate the following five *Chateaugay* factors weigh in favor of such relief: (1) "[T]he court can still order some effective relief"; (2) "such relief will not affect the re-emergence of the debtor as a revitalized corporate entity"; (3) the relief won't unwind and undermine transactions and create an uncontrollable situation for the court; (4) parties adversely affected by the appeal have notice and an opportunity to participate; and (5) "the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from."[xxxi] The Second Circuit found that GLM's appeal was equitably moot because GLM did not demonstrate any of the five factors and that granting GLM the relief it sought could "potentially requir[e] the bankruptcy court to reopen the plan of reorganization."[xxxii]

The Second Circuit's presumption that an appeal is equitably moot when a plan has already been substantially consummated is in stark contrast to the Third Circuit's more hesitant approach, describing equitable mootness as a "narrow doctrine" that must overcome the strong presumption that appeals need to be decided.[xxxiii] Now, with both the *Nuverra* and *Windstream* appellants seeking Supreme Court review, the Supreme Court has ample opportunity to weigh in and decide the fate of the doctrine. Will it take the more reserved approach of the Third Circuit, or will it fully embrace the doctrine like the Second Circuit has done in *Windstream*? Or will the court completely abolish the use of the doctrine as cautioned by the Eighth Circuit? The growing circuit split suggests that the Supreme Court may soon offer new guidance to Article III courts faced with appeals that require examination of confirmed plans.

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[i] *In re Cont'l Airlines*, 91 F.3d 553, 560 (3d Cir. 1996).
[ii] *In re Trib. Media Co.*, 799 F.3d 272, 277 (3d Cir. 2015).
[iii] *Matter of Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994).
[iv] *In re Cont'l Airlines*, 91 F.3d at 561.
[v] *In re Trib. Media Co.*, 799 F.3d at 286; citing Nil Ghosh, *Plan Accordingly: The Third Circuit Delivers a Knockout Punch with Equitable Mootness*, 23 Norton J. Bankr.L. & Prac. 224 & n. 8 (2014) (collecting cases).
[vi] *Matter of UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994); E.g., *In re Chateaugay Corp.*, 10 F.3d 944, 952–54 (2d Cir.1993); *In re Specialty Equipment Cos.*, 3 F.3d 1043, 1047–49 (7th Cir.1993); *In re Andreuccetti*, 975 F.2d 413, 418 (7th Cir.1992); *In re Roberts Farms, Inc.*, 652 F.2d 793, 797 (9th Cir.1981); *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547, 1554–55 (11th Cir.1988); *In re AOV Industries, Inc.*, 792 F.2d 1140, 1147–50 (D.C.Cir.1986).
[vii] E.g., *In re VeroBlue Farms USA, Inc.*, 6 F.4th 880, 889 (8th Cir. 2021); *In re One2One Commc'ns, LLC*, 805 F.3d 428, 446 (3d Cir. 2015).
[viii] *In re VeroBlue Farms USA, Inc.*, 6 F.4th at 880.
[ix] *Id*. at 886.
[x] *Id*.
[xi] *Id*.
[xii] *Id*.
[xiii] *Id*. at 890.
[xiv] *Id*. at 891.
[xv] *In re Nuverra Env't Sols., Inc.*, 834 F. App'x 729 (3d Cir. 2021), as amended (Feb. 2, 2021).
[xvi] *Id*. at 731.
[xvii] *Id*.
[xviii] *Id*.
[xix] *Id*.
[xx] *Id*.
[xxi] *Id*. at 736.
[xxii] *Id.*
[xxiii] *Id*. at 737.
[xxiv] *Hargreaves v. Nuverra Environmental Solutions Inc.*, 834 F. App'x 729 (3d Cir. 2021), *petition for cert.* filed (U.S. July 6, 2021) (No. 21-17).
[xxv] *In re Windstream Holdings, Inc.*, 838 F. App'x 634 (2d Cir. 2021).
[xxvi] *GLM DFW, Inc. v. Windstream Holdings Inc.* (*In re Windstream Holdings Inc.*), 614 B.R. 441, 444 (S.D.N.Y. 2020).
[xxvii] *In re Windstream Holdings, Inc., 838 F. App'x* at 634.
[xxviii] *Id*. at 636.
[xxix] *Id*.
[xxx] *Id.*
[xxxi] *Id.* (quoting *Chateaugay*, 10 F.3d at 952–53 (internal quotation marks and alterations omitted)).
[xxxii] *Id.* at 637.
[xxxiii] *In re Trib. Media Co.*, 799 F.3d at 277-78.

DIVERSITY, EQUITY & INCLUSION SPOTLIGHT:

OMAR J. ALANIZ

By: Sahrish K. Soleja*

Omar Alaniz is a partner at Reed Smith LLP's Dallas and Houston offices. He has practiced bankruptcy law for 18 years. Omar's practice specializes in complex restructurings, focusing on debtor-side representations. Omar is nationally recognized and has received several awards and accolades, including the Sandra Day O'Connor Award for Professional Excellence in the U.S. Supreme Court. Omar was invited to join the prestigious National Bankruptcy Conference, which advises Congress on bankruptcy law, and the American College of Bankruptcy.

Omar is a father to two beautiful kids and a proud member of the LGBTQ+ community. Omar is a strong advocate for promoting diversity, equity, and inclusion in the legal profession. I had the pleasure of interviewing Omar about his experiences as an associate and partner from the perspective of a diverse attorney.

Where did you grow up? I was raised in Mission, Texas. I come from a humble background, and I worked through both undergrad and law school to support myself through school. Fun fact, my grandfather was the first Mexican American baseball player to play for the majors.

How did your identity as a minority lawyer affect your college and law school experience? I went to U.T. Law School, which I very much enjoyed. In college, it felt like I worked more than attended school. So it wasn't until I attended law school that I felt like a minority for the first time in my life. But I chose to assimilate with the student body and participate in social activities. I never felt different because of my race or my sexuality in law school. The more significant challenge was juggling full-time school and working.

Did you have any mentors in law school? I am the first lawyer in my family, so I didn't have a mentor. I began to build my network after my first clerkship. Ken Broughton, who was the head of a Houston law firm I clerked with as a 2L, was my first legal mentor, which is amazing because we both found our way back to each other at Reed Smith, which did not have a Texas office when I met Ken.

What was your first job out of law school? I had two clerkships during law school that were challenging cultural experiences. At one firm, the recruiter casually outed me to the other lawyers and summer associates. I was not ready to divulge that information, and I didn't know how to navigate being out in a professional environment. I also recall a golf summer associate event that I begged to be excused from because I felt like a poor Mexican kid that would make a fool of himself, having never stepped foot on a golf course. I was required to attend, and it was a disaster. I was so nervous, I kept looking at my phone to avoid throwing up. A partner chastised me harshly. I was so embarrassed, and I didn't know how to handle the situation. I later learned that my perceived lack of interest in the golf event became office gossip.

At the other firm, I was paired with only Hispanic mentors (one of which would leave me voicemails only in Spanish), making me feel like I was only there because I was a minority. I didn't

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get a chance to work with the firm's star partners, yet I longingly saw my non-diverse friends meet and work with key partners and decision-makers.

I didn't get job offers from either firm. At the time I was surprised (and devastated) given the very positive reviews I received all through my clerkships. But now, reflecting on my cultural challenges, it is unfortunately not surprising.

I struggled to find a job as a 3L, and the only firm that gave me a job offer after an exhaustive search was a bankruptcy firm now known as Neligan Law in Dallas. I loved the firm, and loved working with Pat Neligan. I fell in love with the bankruptcy practice almost immediately, though I didn't take bankruptcy in law school and never intended to be a bankruptcy lawyer (or to live in Dallas). I immediately decided that I would strive to be the best bankruptcy lawyer in town—much of which was driven by the insecurity of being rejected by the two Houston firms as a summer associate.

How did you end up clerking for Judge Lynn? I took the bankruptcy course through the John C. Ford Inn of Courts that Judge Lynn taught to incoming new bankruptcy lawyers in the DFW area. I was determined to get the Rookie of the Year award and to be the best student. One day after class, Judge Lynn approached me and offered me a clearkship unexpectedly.

What was your experience as an associate in Big Law? Jumping from a 10-lawyer firm to a judicial clerkship and then to a major international law firm was initially intimidating. But I had several great sponsors along the way that took a strong interst in me—mostly from outside my practice group. Initially, I was given sophisticated and challenging assignments, which helped me gain experience and improve my skills. However, there were times when I felt like I wasn't given sophisticated work at my experience level, especially after my senior partner and mentor retired early. Coming to that realization, I decided to take control of my practice.

How did you take control of your practice? The baseline starts with developing your skills and expertise, but you can't rely on your skills and expertise alone. The legal field is a service industry, and developing your network is crucial. Client services is also an integral component of networking. I treated the partners outside my practice group as my clients. I worked hard to become a dependable and indispensable bankruptcy lawyer, so I would always be on top of partners' minds.

How did you become a Partner? It took a few years. When I initially came up for partner, I asked to be special counsel so I could have some time to develop my client base and sharpen my skills. A key turning point was a colleague that had gone in-house and gave me an opportunity to work on a high-profile matter for a large firm client. That engagement was critically important to my long-term carer, including introducing me to Julie Hardin, a member of Reed Smith's executive committee. Julie was counsel to a co-defendant. Our relationship developed over several years and was a significant factor in my choosing to join Reed Smith. By the time I came up for partner again at my prior firm, there was no question in my mind that I was ready. I also had sponsors who advocated for me and to whom I'm so grateful. It was a well-organized effort.

At any point, did you feel like your ethnicity or your sexuality affected your career? At the time, I didn't think my sexuality or ethnicity affected my career. When I first joined Big Law, my senior partner relied on me, and as a result, I got a lot of great experience (particularly in the *ASARCO* case). I felt like he was a Big Law unicorn that was successful, skilled, and embraced my differences. But after he retired, I felt "orphaned" and on an island of my own. That's when I really started to notice that I was being left out of the boardroom and left off of calls, and was given assignments like employment and fee applications, which are typically given to junior associates, despite being a senior associate and having worked on one of the most complex chapter 11 cases in history. I didn't understand why this was happening to me, but one day I had a sudden realization in a partner's office that I was alone and—perhaps—not welcome. I uncontrollably broke down crying.

I'm not the type of person who "looks for racism." But as I've grown in my legal community and observed other diverse lawyers'

similar experiences, I can't help but think that it was because of a subconscious bias. I feel like there might have been a presumption that I was not at the same skill level as my non-diverse peers. As I reflect back, I believe there may have been subconscious bias issues at play, rather than any malicious intent.

Have you witnessed any subconscious bias? Yes. Firms do a great job bringing in diverse candidates but do a subpar job at inclusion. I've observed that if a diverse associate doesn't perform immediately, they're written off right from the beginning. I have seen a reluctance from partners to give diverse associates candid feedback or, worse—a second chance. Fortunately, I do not see that at my new firm where I feel empowered—though not necessary—to be the "hall monitor," ensuring that our diverse associates do not experience my challenges to the same degree.

As a parent, how do you balance work life with family life? Effective time management. My daily life is one big, packed calendar where every hour seems to be carefully managed between work, professional organizations, DEI initiatives, kids, dogs (adorable French Bulldogs), and my partner Dave, whom I adore. But I also vow to myself to carve out a daily hour for mental sanity. If you know me, you know I have a strong passion for fitness. It takes a major work event to make me stray from my workout regime.

What advice would you give for promoting Diversity, Equity, and Inclusion? I believe inclusion is an essential part of DEI because you will never get equity without inclusion. As to diversity, I think law firms do a good job getting diverse candidates through the door, which sometimes is just playing a numbers game. Figuring out how to include those associates and weave them into the fabric of an organization is the challenge that our successful partners should embrace.

Providing diverse associates and non-diverse associates with the same level of work will help balance out the skill levels and provide a fair opportunity for both diverse and non-diverse associates to gain new experiences and skills. Let them listen in to board calls, client calls, negotiations, and calls with opposing counsel. After months of not being invited to calls on a matter, I finally got the nerve to ask a partner to be included. His response was that he didn't want to charge the client. I was shocked at the reason—I would have loved to have listened in to develop my skills and not record my time! Associates need to see how the sausage is made. The value of learning a practice is much more important than a half-hour of billing.

A critical component of strengthening our diverse associates is providing regular and honest feedback, even if it is harsh. I find myself spending a lot of time giving very frank feedback to diverse associates, and I always preface it with an I-want-to-help-you-succeed attitude. But I don't hold back. I have never been disappointed with their reactions and enjoy seeing them develop. It's good for them, good for the firm, and good for my heart.

DANCING AROUND THE LAW:

A Discussion of the Conflict between the Texas Two-Step and the U.S. Bankruptcy System

By: Christopher Phipps & Benjamin Pyle*

There is a new kind of craze taking place in Texas. They are coming in fast and furious, giddy to put on a pair of boots and explore this vast openness and freedom of the Lone Star State. No, they are not looking to put down roots. These are companies, and they are looking to "dance." They came to separate their assets from their liabilities and to expunge their liabilities through bankruptcy in a process affectionately known as the "Texas Two-Step." This process often has the effect of splitting creditors away from the majority of the original companies' assets, and forcing creditors to fight over the heavily indebted scraps. This arrangement obviously benefits would-be corporate debtors by allowing them to artificially partition and limit liability without the drawbacks of a bankruptcy filing, but it raises the question: do state divisive merger laws used in this way conflict with federal bankruptcy statute and case law?

A quick example should demonstrate the choreography of the process.

Step One: Divide and Hide

In Texas, the divisive merger statute allows companies and partnerships to divide their businesses into multiple separate entities, without requiring any notice or arrangements to accommodate creditors for rearranged debt.[1] Chapter 10, Subchapter A of the Texas Business Organizations Code (the "TBOC") permits corporations to perform divisional mergers, in which an existing corporation divides itself into two or more new entities.[2] The original dividing entity is not required to survive the merger, and all liabilities and obligations of the original entity are automatically "allocated to and vested, subject to existing liens or other encumbrances…, in one or more of the surviving or new organizations[.]"[3] Much of this process can be done in less than one day, without any notice to creditors.

The procedure is as follows:

- "Parent Co." effects a divisional merger, dissolving Parent Co. and dividing into two new legacy companies, "Asset Inc." and "DebtCo."
- Asset Inc. gets all of the Parent's operating business as well as the lion's share of Parent Co.'s assets (let's say 95%).
- DebtCo receives the remaining 5% of assets and much, if not all, of Parent Co.'s preexisting legacy liability.
- Parent Co.'s divisional merger plan requires DebtCo to indemnify Asset Inc. against losses related to those liabilities.
- The legacy companies move to separate and different jurisdictions usually with Asset Inc. changing its name to that of former Parent Co.
- DebtCo files a bankruptcy petition after moving to the new jurisdiction.

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Step Two: Channel Your Inner Race Car Driver and Leave 'Em in the Dust

To date, mainly companies with vast asbestos liabilities have dared to dance the Two-Step. That is not to say that this process cannot be done for other liabilities, but the Two-Step provides distinct advantages for debtors with asbestos liability. Congress has provided a specific bankruptcy remedy for dealing with mass tort liabilities in 11 U.S.C. § 524(g), which provides for channeling injunctions.[4] The unique nature of asbestos injuries, including the decades that may pass between exposure and manifestation of an injury, spurred Congress to create a method to allow debtor companies to funnel those liabilities into a trust to resolve the related claims.

> "In granting bankruptcy courts the power to provide injunctive relief to non-debtors, Congress stated that courts may bar an action directed against a third party who 'is alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the debtor to the extent such alleged liability of such third party claims arises by reason of …'[the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party.]"[5]

Channeling injunctions pursuant to section 524(g) are a key advantage for debtors with asbestos liability. Chapter 11 bankruptcies require creditors to approve a plan of reorganization. Specifically, a supermajority (75%) of those creditors to be channeled who vote on the plan must approve the plan for the bankruptcy to be consummated. Coupled with an automatic stay, the injunction works to force a debtor's numerous creditors to the negotiation table. Hence, Congress provided a bankruptcy remedy for debtors with these mass tort liabilities, but through the two-step, some companies go beyond that remedy, performing divisive mergers to further divorce themselves from such liabilities.

This separation evolves into a larger concern when an original dividing entity allocates the liabilities and obligations (re: debt) into one new entity, while putting the majority of the existing assets into another new entity. That development has a number of effects for any existing creditors. First, it allows debtors to artificially cap their debt, and in so doing, limit the potential recovery of a creditor to the assets of the new debt-encumbered entity. The bankruptcy process provides a way for debtors to discern and manage debt, but divisional mergers done in this way plainly separate the bulk of the assets from the new organization responsible for paying the debt. Creditors are forced to depend on the original company appropriately funding the new organizations based on their respective liabilities. If the new entity is not funded appropriately, it could push that entity into bankruptcy. A skeptical observer may argue that this is the main point of the divisional merger: to eliminate the debt in bankruptcy while

keeping the majority of the original entity's assets out of the bankruptcy estate.

Step 3: They'll Never See It Coming

Texas law has no notice requirement for creditors who might be prejudiced by the transfer of assets and debt. When more than one entity survives or is created by a merger, the plan of merger (or divisive merger) must contain "the manner and basis of allocating each liability and obligation of each organization that is a party to the merger, or adequate provisions for the payment and discharge of each liability and obligation, among one or more of the surviving or new organizations."[6] Put simply, the plan for a divisive merger must lay out the existing debt of the original organization and how the debt will be paid. Merger plans are filed with the Texas Secretary of State, but, unlike the bankruptcy process, there is no notice given to the creditors. If a Texas Two-Step is executed, by the time creditors are notified in the subsequent bankruptcy, the automatic stay is in place.

Step 4: Automatic(ally) Stay Out of It

Anyone familiar with bankruptcy court knows of the power of the automatic stay. In the event of a bankruptcy filing by the newly debt-encumbered entity, the automatic stay prevents creditors of the original (now non-existent) entity from suing the debtor. Further, U.S. bankruptcy law empowers only the debtor or trustee with the right to bring a cause of action against the original entity.[7] Likewise, many courts have held that fraudulent conveyance and interference claims involving a debtor necessarily belong to the bankruptcy estate. "[I]t is the bankruptcy trustee, not individual . . . claimants, that has standing to assert fraudulent conveyance claims and claims that shame the same underlying focus. . . ."[8] In Texas, it is "widely accepted that only the trustee (or debtor-in-possession) has independent standing to pursue […] avoidance actions and other estate causes of action."[9] The basic rationale is that those actions are so intimately wrapped up in the estate that the only parties who can enforce them are the debtor or the trustee. Creditors unable to obtain derivative standing may suffer material harm in losing the ability to pursue certain legal remedies in court.

Step 5: Finish with a Flourish

According to the TBOC, the divisional merger law does not "affect, nullify, or repeal the antitrust laws or abridge any right or rights of creditor under existing laws."[10] That however, is hard to square with U.S. bankruptcy law and procedure. If courts decide that a creditor harmed by the exercise of a divisional merger cannot directly pursue a remedy they otherwise would have, then creditor rights have been abridged. Creditors are obliged to hope that a debtor or trustee would advocate their position.

Chapter 11 of the Bankruptcy Code exists to assist "financially distressed businesses" by providing them with breathing space in which to return "to a viable state."[11] The process allows debtor companies to keep possession of their assets and continue operating, in exchange for working out a plan to pay creditors in exchange for a discharge of their debts. Implicit in that exchange is a requirement of good faith on behalf of the party filing for bankruptcy protection, and the "absence of which may constitute cause for dismissal."[12] The Bankruptcy Code also requires reorganization plans to be proposed "in good faith."[13] In theory, the Texas divisional merger statute does not conflict with the purpose of the Bankruptcy Code; but in practice, creditors are right to question whether the combination of divisional merger

debt assignment and bankruptcy can be married in good faith.

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[1] TEX. BUS. ORGS. CODE § 10.008.
[2] *Id. at* § 10.008(a)(2).
[3] *Id.*
[4] 11 U.S.C. § 524(g); *see also* 11 U.S.C. § 105(a) (allowing bankruptcy courts to design equitable remedies such as channeling injunctions outside of 11 U.S.C § 524(g), if necessary).
[5] *Travelers Indem. Co. v. Bailey*, 557 US 137, 154 (2009) (citing 11 U.S.C. § 524(g)(4)(A)) (see subpart (iv)).
[6] TEX. BUS. ORGS. CODE § 10.003(3).
[7] *See* 11 U.S.C. § 544(b); 11 U.S.C. § 548
[8] *In re Aldrich Pump LLC*, No. 20-30608 (JCW), Adv. Proc. No. 20-03041, (Bankr. W.D.N.C. Aug. 23, 2021) (citing *Nat'l Am. Ins. Co. v. Ruppert Landscaping Co., Inc*., 187 F.3d 439, 441 (4th Cir. 1999)).
[9] *In re Smith*, 521 B.R. 767 (Bankr. S.D. Tex. 2014) (quoting *Reed v. Cooper*, 405 B.R. 801, 807 (Bankr. N.D. Ga. 1994)).
[10] TEX. BUS. ORGS. CODE § 10.901.
[11] *In re Premier Auto. Servs*., 492 F.3d 274, 284 (4th Cir. 2007).
[12] *See, e.g*., *In re SGL Carbon Corp*., 200 F.3d 154, 165 (3d. Cir. 1999); *Carolin Corp. v. Miller*, 886 F.2d 693, 700 (4th Cir. 1989); *In re Little Creek Dev. Co*., 779 F.2d 1068, 1072 (5th Cir. 1986).
[13] *See* 11 U.S.C. § 1129(a)(3).

JUDICIAL SPOTLIGHT: CHIEF JUDGE BRENDA T. RHOADES

By: Danielle Rushing and Maegan Quejada*

Though her love for the law was sparked as a child helping her mom prepare for her citizenship exam, Chief Judge Rhoades didn't seriously consider law school until she took the LSAT after being informed that women did not have the requisite analytical skills to do well on the LSAT. In another life, Chief Judge Rhoades may have ended up as an engineer like many of her classmates who also majored in applied mathematics at Texas A&M University. Similarly, she didn't take any bankruptcy courses while pursuing her law degree at Arizona State University and expected to practice in the litigation department of her firm. The head of her firm's bankruptcy group, former Judge Dean Gandy, asked her to work on a case in Arizona. She ended up in the bankruptcy group where she was able to get opportunities to appear in court sooner than she would have if she were in the litigation group. During her career in private practice, she represented debtors, creditors, bondholders, and creditors' committees in complex chapter 11 cases. She also has experience representing trustees in consumer cases. She practiced mainly in Texas, but also spent part of her legal career in Florida as well as Alaska where she had lived after immigrating to the United States from Seoul as a child.

Chief Judge Rhoades was appointed to the bench in 2003. At that time, she was the only Asian American bankruptcy judge, and only the second Asian American ever appointed to the bankruptcy bench. She currently presides over the Texarkana and Sherman Divisions of the Bankruptcy Court for the Eastern District of Texas. She believes that judges should provide a fair forum for people to be heard and that judges should be kind, thoughtful, and respectful; all of which she strives to achieve every time she takes the bench. Her current focus is to continue to make her court accessible and user friendly for all users.

Outside of the courtroom, Chief Judge Rhoades enjoys cooking, movies, nature walks, mentoring women, and spending time with family and treasured friends. She volunteers for the Orchid Giving Circle at Texas Women's Foundation, an organization of Asian women who help source grants for charities. She also enjoys learning to play mahjong.

When asked for her advice to young bankruptcy attorneys, particularly women and minorities, she said:

> Project self confidence – people won't put their trust in you if

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you don’t show you’re
confident.

Uplift each other.

SUPREME COURT SPOTLIGHT

RBG Clarifies What is Immediately Appealable in Bankruptcy:

Final Order, or Not a Final Order? That Is the Question

By: Frances A. Smith and Charles Gooch Cowden*

Before her death last year, Ruth Bader Ginsburg issued a unanimous opinion on a longstanding bankruptcy issue: which orders can be appealed immediately as of right, and which cannot be? In *Ritzen Group, Inc. v. Jackson Masonry, LLC*, Justice Ginsburg clarified what constitutes a "final order" in bankruptcy, immediately appealable under section 158 of the Bankruptcy Code.[1] Specifically, in *Ritzen*, the Supreme Court held that an order denying relief on a creditor's motion for relief from the automatic stay is a final order, and thus immediately appealable as of right.

Justice Ginsburg's reach in *Ritzen* extends beyond the issue of whether the denial of a motion for relief from stay is a final order. To understand *Ritzen*'s significance, one must first understand the context of the overarching issue at stake: final order, or not a final order? That is the question.

Under section 158 of the Bankruptcy Code, an appeal lies from "final judgments, orders, and decrees" entered by bankruptcy courts "in cases and proceedings."[2] This means that a bankruptcy court's order may be appealed immediately as of right if the order is "final." Lamentably, the Bankruptcy Code provides little guidance on what constitutes finality.

The Supreme Court has stated that a final order "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[3] Bankruptcy court orders are also considered final and thus immediately appealable if they "dispose of discrete disputes within the larger [bankruptcy] case."[4]

If an order is not "final," then it is interlocutory. Compared to final orders, interlocutory orders decide intervening matters and require some other action for a court to adjudicate the cause on the merits.[5]

Unlike appeals from final orders, appeals from interlocutory orders may be taken only by the consent of the district court or bankruptcy appellate panel (BAP).[6] Therefore, while an appeal from a final order may be taken by filing a notice of appeal, an appeal from an interlocutory order requires another court to grant leave to appeal.[7] The difference here is crucial: if an order is "final," then it may be appealed immediately as of right. But if it is interlocutory, then the order may be appealed only after hearing and with the discretion of the district court or BAP. Thankfully, in *Ritzen*, Justice Ginsburg offers some guidance.

In *Ritzen Group, Inc. v. Jackson Masonry, LLC*, Ritzen Group and Jackson Masonry had a contract. Ritzen sued Jackson under the contract in state court. On the eve of trial, Jackson filed for bankruptcy. This filing automatically stayed the state court litigation during the pendency of the bankruptcy case. In the bankruptcy court, Ritzen filed a relief from stay motion under section 362(a)(1) of the Bankruptcy Code to continue pursuit of the breach of contract claim in state court. The bankruptcy court denied the lift stay motion, and Ritzen did not appeal. Instead, Ritzen filed a proof of claim in the bankruptcy case. Later, the bankruptcy court disallowed Ritzen's claim after finding that Ritzen was the breaching party, not Jackson. The court then confirmed Jackson's chapter 11 plan of reorganization, which permanently enjoined creditors from pursuing

* Frances Smith is a shareholder at Ross & Smith, PC and Charles Cowden is an associate at Ross & Smith, PC.

claims against Jackson. Ritzen did not object to the plan.

After confirmation, Ritzen appealed both the denial of the lift stay motion and the disallowance of Ritzen's claim. The district court found that Ritzen's appeal of the lift stay motion was untimely and upheld the disallowance of Ritzen's claim. The Sixth Circuit affirmed the district court's ruling, concluding the lift stay order was "final" under section 158, but defective since Ritzen had missed the window to appeal proscribed by the Bankruptcy Code. The Supreme Court granted certiorari.

At the Supreme Court, Ritzen argued that the entire claims adjudication process, stemming from the lift stay motion and including the disallowance of Ritzen's claim and confirmation of Jackson's plan, was all a "final order" from which Ritzen could appeal immediately as of right under section 158. In the alternative, Ritzen argued that the lift stay motion was not itself a final order but merely the first step in the claims adjudication process. According to Ritzen, treating the lift stay motion as a single procedural unit would force creditors to pursue inefficient, piecemeal appeals. The Supreme Court rejected both arguments.

Justice Ginsburg identified the issue as follows: "[d]oes a creditor's motion for relief from the automatic stay initiate a distinct proceeding terminating in a final, appealable order when the bankruptcy court rules dispositively on the motion?"[8] Justice Ginsburg responded in the affirmative, stating "we hold that the adjudication of a motion for relief from the automatic stay forms a discrete procedural unit within the embracive bankruptcy case. That unit yields a final, appealable order when the bankruptcy court unreservedly grants or denies relief."[9]

In its analysis, the Supreme Court drew from an earlier case, *Bullard v. Blue Hills Bank*. In *Bullard*, the Court held that "orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger [bankruptcy] case."[10] In *Bullard*, the Supreme Court held that an order denying plan confirmation was not "final" because the plan process continued despite the denial. Applying the logic of *Bullard* to *Ritzen*, the Court rejected Ritzen's argument that the entire claims adjudication process is a final order. Instead, the Court found that the lift stay motion alone was a complete procedural unit, and that the bankruptcy court's order resolving the lift stay motion was "final."

The Court also disagreed with Ritzen that such holding would promote inefficiency. In fact, Justice Ginsburg said the opposite is true, citing the procedural posture of Ritzen's own case. Under the rule Ritzen had proposed, creditors losing lift stay motions would be forced "to fully litigate their claims in bankruptcy court and then, after the bankruptcy case is over, appeal and seek to redo the litigation all over again in the original court."[11] As explained by Justice Ginsburg, Ritzen's case serves as the perfect example: Ritzen lost the lift stay motion; in the claim dispute, Ritzen fully litigated its breach of contract claim and lost again; Ritzen did not object to Jackson's reorganization plan; and after all that, Ritzen appealed the denial of the lift stay motion so that Ritzen could re-litigate the original breach of contract claim in state court. According to Justice Ginsburg, an immediate appeal would solve this problem by allowing creditors to effectively resolve their claims at the appropriate moment in the bankruptcy case.

Ritzen is an important decision because it provides guidance on what constitutes finality under the Bankruptcy Code. In particular, the Supreme Court decided that lift stay orders granting or denying the requested relief should be treated as "final" when silent as to prejudice. On its face, this means *Ritzen* will serve as a helpful tool to creditors—who, in the past, have been forced to wait months, sometimes years, for judicial resolution—seeking immediate appellate review on lift stay motions.

While *Ritzen* offers helpful guidance, it still leaves open the question of whether a stay relief order under section 362(d)(2) is final where a court enters the order without prejudice. Ritzen also leaves open for interpretation whether issues similarly situated to a lift stay motion are considered "final." Luckily, that gives us the wonderful opportunity to play a little-known bankruptcy game called *Final or Not Final?* You can play now by guessing whether these orders are considered by courts to be "final" under section 158 of the Bankruptcy Code: (1) an order denying a motion for withdrawal of the reference; (2) an order denying remand of a case removed to federal court; (3) an order approving a 9019 settlement agreement; (4) an order appointing counsel for a trustee; (5) an order denying a motion to dismiss concerning eligibility to be a debtor; (6) an order denying approval of the disclosure statement. See the endnotes for the answers.[12]

[1] *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582 (2020).

[2] 28 U.S.C. § 158(a)(1).

[3] *Catlin v. United States*, 324 U.S. 229, 233 (1945).

[4] *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501 (2015).

[5] *In re Kutner*, 656 F.2d 1107, 1112 (5th Cir. 1981) (citing 1 Collier on Bankruptcy, ¶ 3.03 at 3-301(15th Ed. 1980)).

[6] 28 U.S.C. §§ 158(a)(1), (a)(3).

[7] FED. R. BANKR. P. 8003-04.

[8] *Ritzen Grp.*, 140 S. Ct. at 586.

[9] *Id.*

[10] *Bullard*, 575 U.S. at 501.

[11] *Ritzen Grp.*, 140 S. Ct. at 591.

[12] Here are the answers: (1) Not a final order. *In re Lieb*, 915 F.2d 180, 184 (5th Cir. 1990); (2) Not a final order. *Melancon v. Texaco, Inc.*, 659 F.2d 551, 552 (5th Cir. 1981); (3) Final order. *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop.)*, 119 F.3d 349, 355 (5th Cir. 1997) (5th Cir. 1997); (4) Not a final order nor appealable. *Dodson v. Huff (In re Smyth)*, 207 F.3d 758, 763 (5th Cir. 2000); (5) Not a final order. *In re Greene Cty. Hosp.*, 835 F.2d 589, 595 (5th Cir. 1988); (6) Not a final order. *In re Tex. Extrusion Corp.*, 844 F.2d 1142, 1155 (5th Cir. 1988).

TROOP MOVEMENTS FOR FALL 2021

Lou Strubeck, Laura Smith, Emma Persson, Greg Wilkes, Scott Drake, and **Nick Hendrix** moved to O'Melveny & Myers LLP.

Brian Kilmer moved from Kilmer Crosby and Quadros PLLC to K&L Gates.

Callan Searcy started a new position at the Texas Attorney General's Office as Assistant Attorney General, Bankruptcy & Collections Division.

Paul Hammer, formerly of Kane Russell Coleman has joined Barron & Newburger, P.C. in its Houston office.

Heather Gram-Chavez moved from Marinosci to Miller, Watson & George.

The firm **Parkins Lee & Rubio LLP** was started on August 1, 2020.

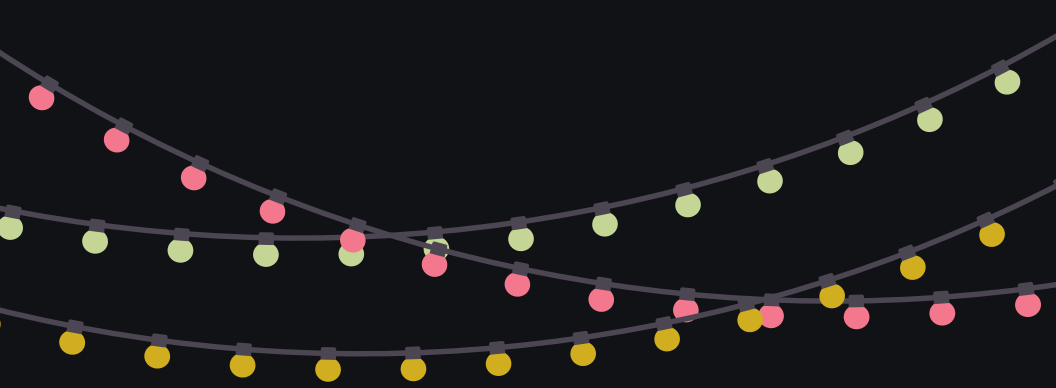
Stacey Salters moved to Thompson Coburn LLP.

Anne Elizabeth Burns, **Christopher J. Volkmer**, and **Emily S. Wall** are now shareholders of Cavazos Hendricks Poirot, P.C.

Beverly Cahill has moved to become a Shareholder at Waddell Serafino Geary Rechner Jenevein, P.C.

The Fifth Circuit Court of Appeals has selected **Michael M. Parker** as the next bankruptcy judge in the Western District of Texas, San Antonio Division. **Congratulations Judge Parker!**


40th Annual Jay L. Westbrook
BANKRUPTCY CONFERENCE
Austin Nov 17-19, 2021 Fairmont Austin
$725 Individual | $775 after Nov 10
$655 Group rate per person (5 registrants minimum) | $705 after Nov 10
$580 Group rate per person (10 registrants minimum) | $630 after Nov 10
Live Webcast Nov 17-19, 2021
$525 Individual | $575 after Nov 10
$475 Group rate per person (5 registrants minimum) | $525 after Nov 10
$420 Group rate per person (10 registrants minimum) | $470 after Nov 10



YLC RECEPTION

Please join the Young Lawyers Committee at an after-dinner dessert and cocktail reception as we honor retiring Judge Ronald B. King and our new Texas bankruptcy judges.

NOVEMBER 18, 2021 • THURSDAY
8:00-11:00 PM
RULES & REGS
7TH FLOOR, FAIRMONT HOTEL
101 RED RIVER ST.

Rules & Regs has a large outdoor patio.
The first 100 guests will each receive two drink tickets.

STATE BAR OF TEXAS
BANKRUPTCY LAW SECTION
YLC

YOUNG LAWYERS COMMITTEE

UNITED STATES TRUSTEE PROGRAM INFORMATIONAL NOTICE

EMERGENCY RENTAL ASSISTANCE PROGRAMS

If you are a renter having trouble paying your rent or a landlord who has lost rental income due to challenges presented by the COVID-19 pandemic, help may be available. Through funding from the U.S. Department of the Treasury's Emergency Rental Assistance (ERA) program, there are a wide variety of state and local programs that offer assistance—including financial assistance—to those who are struggling to make ends meet.

Provided below are links to learn more about ERA programs in your local area, including how they work and who is eligible, as well as other important information to help you navigate these difficult times. ERA programs can vary based on locale since flexibility is given to states to develop programs that best suit the needs of their communities.

For more general information on assistance programs, visit: https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/

For ERA program links in your local area, visit: https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/renter-protections/find-help-with-rent-and-utilities/

To get answers to frequently asked questions, visit:

For Renters: https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/renter-protections/emergency-rental-assistance-for-renters/

For Landlords: https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/help-for-landlords/

To talk with a no-cost Department of Housing and Urban Development-approved housing counselor who can help you understand your options, make an action plan, and even help you apply for rental assistance, call (800) 569-4287 or visit https://www.consumerfinance.gov/find-a-housing-counselor/.

September 2021

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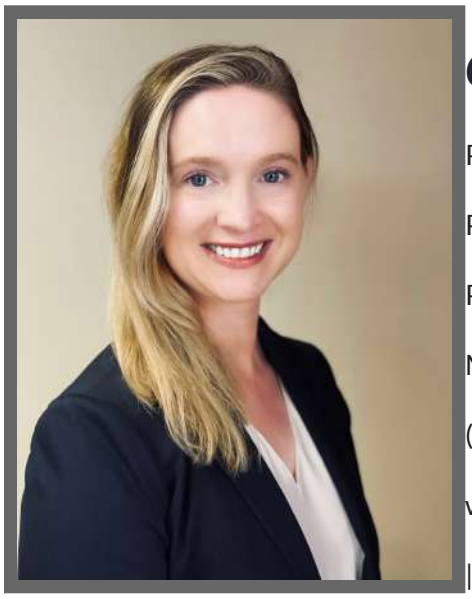

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