

ROGUES,
RASCALS &
RATTLESNAKES

President's
Message

THE COLLEGE
AND DEI
Whither from Here?

A WARM WELCOME
to Class 34



COLLEGE COLUMNS

A MAGAZINE FOR AMERICAN COLLEGE OF BANKRUPTCY FELLOWS | DEC. 2022



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From the Chair

*Melissa S. Kibler, Accordion
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It is hard to believe that we already find ourselves in the midst of the holiday season, looking in the rearview mirror at another year and another successful fall meeting for the College. Our various board and committee meetings in Orlando were capped off by the All-Fellows Luncheon that provided a welcome opportunity for networking and included a spooky presentation entitled “Tales from the

Crypt-O.” Judge Martin Glenn, Mohsin Meghji and Vince Lazar delivered an enthralling (and timely, particularly given recent events) panel that overviewed the cryptocurrency landscape and focal points of distress and debated several intriguing questions at the intersection of crypto and bankruptcy, the answers for many of which remain unclear as the insolvency profession treads new ground in these cases. Importantly, our luncheon also featured the presentation of the inaugural Diversity, Equity and Inclusion (DEI) Excellence Award to two very special and worthy recipients: **Judge Jeff Hopkins** and **Judge Laurel Isicoff**, co-chairs of the College’s Select Commission on Diversity, Equity and Inclusion, which delivered its final report in April 2022. The establishment of this award is a great example of the College using its honorary capacity to recognize achievements in advancing DEI in our organization and our profession.

During the NCBJ conference, the College also co-sponsored the American Bankruptcy Law Journal’s academic symposium on arbitration and bankruptcy moderated by **Judge Michelle Harner** and featuring **Professor Robert Lawless** and other academics, and presented the NCBJ International Program on the role of international courts and forums in insolvency dispute resolution moderated by **Judge Elizabeth Stong** with panelists including **Judge Christopher Sontchi, Leyza Blanco** and **Jane Kim**. Our newly formed DEI Committee co-sponsored both a mixer/meet-and-greet event for IWIRC members with five to ten years’ experience and the NCBJ diversity reception, which connected certain College Fellows with rising diverse attorneys, professionals and students – including the three Blackshear Fellows whose attendance at NCBJ was funded by the College.



It has been wonderful to see the acceleration in College activity this year – adding many in-person events to those that we continue to find are actually better facilitated over video conference to bring more of our Fellows together with more frequency. In the area of education, most circuits have held some form of programming, much of it in-person, ranging from joint programs like the 5th and 10th Circuits’ day of ethics in the mountains of Utah – complete with costumes and game shows – to the 6th Circuit’s Horses and Bourbon in Kentucky and many other Circuits’ ongoing collaborations with law schools.

The College’s other committees have also been very active, and I will highlight our two new committees. First, the Freshman Fellows Committee, headed by **Judge Lisa Beckerman**, has created a four-installment virtual curriculum that should obviate the need for cramming all that information into the early one-hour breakfast the morning after induction that I know you all remember so fondly. The Freshman Fellows Committee also is rolling out its new Fellows mentorship program for Classes 31, 32 and 33. Second, the DEI Committee, co-chaired by **Judge Erithe Smith** and **Paul Harner**, is charged with implementing the Commission’s recommendations and is one of the hardest working and busiest in the College – they have participated in more than fifty (50) meetings since their formation in March, with subcommittees focusing on internal matters, external matters and communications.

I am also thrilled to report that not only the DEI Committee but every committee and part of the College has truly demonstrated the mindfulness about diversity, equity and inclusion that it is our goal to foster. For example, our Board of Regents just announced an impressive slate of new Fellows, with 20 of 39 candidates being diverse. The Bankruptcy History Committee has developed a long list of diverse Fellows whose oral histories are in the works; our education committees are rethinking the ways that topics and speakers are selected for programs; and the Foundation has changed its mission and bylaws to add pipeline and DEI initiatives to its fundraising and grant making. And these are but a few – the change is noticeable.

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President's Message: Rogues, Rascals & Rattlesnakes

*Charles A. Beckham, Jr., Haynes and Boone, LLP
President, American College of Bankruptcy*



Hey, it was great seeing so many of you in Orlando at the College meetings. Tip of the hat to Melissa Kibler, our Chair for running a great Board of Directors meeting and compliments to Shari Bedker and her

team for coordinating and running a great College get-together. Getting together confirms our dedication to the enhancement of professionalism, civility, scholarship and service to the bankruptcy community.

While I've got ya, let me tell you a tale about Rogues, Rascals and Rattlesnakes. In May I told you about part of my journey to becoming a bankruptcy lawyer in Old El Paso. I didn't start as a bankruptcy lawyer; I thought I was going to become a litigator. After clerking for United States District Judge Halbert O. Woodward in Lubbock, I moved home to El Paso to become a litigator. But, Lubbock is where this story of Rogues, Rascals and Rattlesnakes begins.

One of my duties as a law clerk was answering the phone when the Judge's secretary was away. (Ruth, the Judge's secretary, was a chain smoker and spent a lot of time on the courthouse steps.) A regular caller to Judge Woodward was his University of Texas law school roommate. The calls would go something like this.

ME: "Hello, Judge Woodward's Office."

THE ROOMMATE: (In a Texas twang) "Is Hal there?"

ME: "May I ask who is calling?"

THE ROOMMATE: "Just put me through, I'm his old Roommate."

I reluctantly put the call through the first time and once I knew the distinct Texas accent, on many other occasions. Sometimes, the Roommate would engage me in some friendly banter about whether Ole Hal was treating me right. Of course, he was. From time to time while the calls were still going on, I would go into Judge Woodward's office to remind him it was time to return to the Court. I would overhear the two lifelong friends laugh over politics and the news of the day. It is the same type of conversation we all have with our college and law school buddies.

After my clerkship ended, I moved to El Paso to become a litigator. I missed my exchanges with the Roommate and I didn't become a litigator. I became a bankruptcy lawyer. Soon, I learned the ways of bankruptcy and the parties involved. I started as a secured lenders' lawyer filing motions for relief from stay to seek to foreclose on cars, trucks, tractors, trailers, cattle, oil wells and ranches. My mentor in the bankruptcy practice often referred to debtors as Rogues, Rascals and Rattlesnakes; characters to be cautious around. Once we started doing some debtor work, I soon learned that while some debtors may be Rogues, Rascals or Rattlesnakes, not all were necessarily dangerous, bad or evil. Many were good folks simply trying to weather the storm.

Comically, I found that some of my first debtor clients were more rascal or rogue



than rattlesnake. My first debtor client, a trucking company, owned five tractors and trailers all secured by different lenders. When tractors broke down, my client moved engines from one tractor to another to keep on trucking. When I advised him he couldn't do that, he didn't seem to care. My next debtor case was a bus company called Trans Texas Coaches. Trans Texas operated the Continental Trailways bus line from Presidio, Texas to Enid, Oklahoma. When tires went flat, Trans Texas switched tires from one bus to another to keep the wheels moving. When challenged about the propriety of swapping tires, my client told me to stick to bankruptcy and he would drive the bus. While roguish and rascalish, their conduct was not as dangerous as a rattlesnake. Neither case worked out well and the rattlesnakes would come later.

Overtime I learned in representing lenders and debtors, large and small, that some folks just fell on hard times. When debtors walk into our office, they are looking for help and guidance; creditors are the same. It's how we assist them and how they react and persevere in hard times that show us their true character. Equally important is how we respect each and every debtor before we label them Rogues, Rascals and Rattlesnakes.

During my clerkship in Lubbock, I never met the Roommate in person. He was calling from his office in Austin or Washington, D.C. I knew who he was and he was easily recognizable and memorable for anyone who grew up in Texas. He had been on the TV news and in newspapers for years. My mother once described him as the most handsome man in Texas.

It was a few years later when I first saw the Roommate in person. I didn't recognize him immediately. A man wearing a nice business suit and black cowboy boots was sitting on



a bench outside the Bankruptcy Court on the third floor of the old federal courthouse in San Antonio. His Stetson was carefully placed upside down on the bench next to him. The man was leaned over with his face in his hands, out of sadness I supposed. When he raised his head I realized who it was immediately. His silver hair caught the sun light and came through the window in the hallway and shined. That same window looks out over the Alamo where so many Texas legends died. I had flown to San Antonio for a hearing in the Bankruptcy Court for the Western District of Texas (the Western District of Texas, although larger than most states only had two bankruptcy judges at the time, both sitting in San Antonio; six hundred miles away from El Paso.

I knew why the Roommate was there, his bankruptcy was big news in Texas. The Roommate was there for a hearing in his personal Chapter 7. I knew this day must be a challenging day for such an iconic Texan, but much less challenging than that sad day in Dallas in November 1963 when the Roommate and President Kennedy were the victims of an assassin's bullets.

After a few moments, however, I determined that despite my reservations I would go over and introduce myself.

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From the Foundation

*Jan Hayden, Baker Donelson Bearman Caldwell & Berkowitz, PC
Chair, American College of Bankruptcy Foundation*



For those of you who made it to the meetings in Orlando, congratulations on earning at least 10,000 steps per day! For those of you who missed it, when we were not walking long distances, the Foundation board was quite busy. First as part of the College's DEI initiative, we modified the Foundation's bylaws to reflect the incorporation of our DEI goals into our work. We also modified

the name of the Pro Bono Committee to better reflect its expanded duties. It is now the Grants Committee. We approved the report of the Grants Committee, and I don't want to steal Norm's thunder, but we approved 45 grants for over \$436,587. He will give you the details in his column, but I am particularly proud of the fact that we awarded our first DEI program so quickly in the process.

Enough bragging on the hard work the Foundation has done. By the time you read this, you will have received emails from me and your Circuit leaders encouraging you to make a year-end donation to the Foundation to support the funding of pro bono work throughout the country and now our DEI initiatives. Last year you donated over \$412,000 to support these programs and we hope that, as we now have expanded our work to include DEI initiatives, we can top that number!

Each of you have historically been leaders in your profession and your community. If you had not been, you wouldn't be a Fellow. So, I do not need to tell you how much to give, but I can share a couple of ideas. For some, a good measure to give one hour of billable time. It is easy to calculate and something that many of us can easily relate to and value. Others have decided to join our Four Figure Club and express their generosity by giving \$1,000 or more to the Foundation. Please give the same thoughtful consideration that you have given throughout your life to your various endeavors, and we are confident that you will find the right level for you. Once you do, simply go to the below link and you will find a button to donate electronically and also instructions for mailing checks: [donate here](#).

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Be Proud of the Contributions Across the Country That You Have Made

*Norman L. Pernick, Cole Schotz, P.C.
Chair, Grants Committee*



This is my favorite time of year, because all of the hard work that the Foundation and the Pro Bono Committee do seeking donations, soliciting grant applications from across the country, and reviewing applications and deciding priorities, comes to fruition in October and November with the approval of grants and the disbursement of funds to organizations servicing so many in need. The College and the Foundation are again poised to change lives across the country due to your generosity.

2022 Grants. Once again, the College and the Foundation were able to award grants to pro bono legal service programs that provide assistance to the most vulnerable. Because of the generosity of the Fellows, the College and Foundation awarded \$436,587 to 45 organizations, funding programs in 20 states plus the District of Columbia. The grantees include organizations in large metropolitan areas such as Boston, Chicago, Los Angeles, Miami, New Orleans, New York, Philadelphia, and San Diego, as well as in smaller cities such as Baltimore, Burlington VT, Cincinnati, Denver, Flint MI, Mobile, Nashville, Salt Lake City, and Tucson. The awards include grants to six new grantees that have not previously received a grant from the Foundation. A full list of our 2022 grantees is on [page 8-9](#). The grantees

will use our funds to assist with volunteer trainings, pro se clinics, self help desks, and technology or equipment, often to assist in remote and in-person communications with clients and volunteers. Many of the grantees have partnered with local bar associations or volunteer bankruptcy professionals to leverage their resources and maximize their reach.

Our grantees will also use grant funds to leverage the reach of their programs, including:

- Campbell University's Pro Bono Law Clinic in North Carolina receives referrals from legal services, private attorneys, bankruptcy trustees, as well as the court when a person's pro se efforts appear to affect the proper administration of justice. Students in the clinic counsel clients, gather information, and prepare the documents to prepare and prosecute Chapter 7, 11 and 13 cases.

- Dade Legal Aid – Put Something Back will provide and expand access to justice to low-income individuals throughout Miami-Dade County facing bankruptcy assistance. They will conduct outreach to the most vulnerable, diverse, hard to reach groups in the community since there is still a great need for information to educate and inform individuals of their rights and options. With the assistance of this grant, they will be able to provide crucial information via virtual clinics and podcasts at different courthouses throughout the county; and recruit and train new attorneys to help with

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THE FOUNDATION PROUDLY SUPPORTS THE FOLLOWING 2022 GRANTEEES:

1ST CIRCUIT

VETERANS
LEGAL SERVICES



2ND CIRCUIT



3RD CIRCUIT



4TH CIRCUIT



Financial Protection Law Center

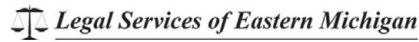


5TH CIRCUIT





6TH CIRCUIT



8TH CIRCUIT



9TH CIRCUIT

California Western
Community Law Project



10TH CIRCUIT



11TH CIRCUIT





The College and DEI: Whither from Here?

Hon. Erithe Smith, C.D. California

*Paul E. Harner, Sheppard Mullin Richter & Hampton LLP
Co-Chairs, Diversity, Equity and Inclusion Committee*



In May, our column highlighted “The Hard Work to Be Done” because there is, in fact, so much that can be accomplished both inside the College and (building on that wonderful platform) in the larger bankruptcy, restructuring and insolvency community. The tasks often seem daunting, and the race truly is a marathon, rather than a sprint. But we believe that

are, to say the least, enthusiastic, dedicated and hardworking, but they also understand that “Rome was not built in a day.” Building a thriving DEI culture within the College and in our larger community will take time – a lot of time. And along those lines, since March 2022, members of the Committee collectively have participated in more than 50 meetings and have expended more than 500 hours of their time on Committee-related matters.

Committee Structure

In order to efficiently meet its short- and long-term objectives, the Committee has organized itself into three Subcommittees: Internal, External, and Communications. Each Subcommittee is tasked with focusing on discrete aspects of the Committee’s charge and making recommendations to the full Committee regarding strategies designed to meet the directives of the DEI-related resolutions promulgated by the DEI Commission and approved by the College Board at its March 2022 meeting.

The Hard Work of the Subcommittees

Internal Subcommittee

Members: Hon. Joan Feeney (Chair), Agustin Berdeja-Prieto, Rozanne Giunta, Peggy Hunt, Catherine Steege, and Prof. Jack Williams

The Internal Subcommittee, which has been meeting twice each month, makes recommendations to the Committee regarding DEI objectives, issues and concerns that involve the College’s membership and leadership, including DEI training, development of DEI standards

the Diversity, Equity and Inclusion (DEI) Committee is off to a roaring start.

That most recent column outlined several specific resolutions, as adopted by the College’s Board of Directors, charging the DEI Committee with various near- and longer-term missions. In this issue of College Columns, we report on the Committee’s extensive activities to date to further the goals outlined by the Board. Of course, that builds upon the prior work, in 2021-2022, of the initial Select Commission on Diversity, Equity and Inclusion, co-chaired by Judge Jeffery Hopkins and Judge Laurel Isicoff (More below on their incomparable leadership of the Select Commission.)

The work of the newly formed DEI Committee is vast in scope and is a year-round endeavor. The Committee’s members



and principles (including those based on the Rooney/Mansfield Rules) for Circuit Admissions Councils, Board of Regents, Judicial Fellows Nominating Committee and International Fellows Nominating Committee, development of strategies for the advancement of diverse Fellows into leadership positions within the College, and monitoring of the implementation of the Freshman Fellows Program.

Not unexpectedly, out of these many tasks, the Internal Subcommittee has prioritized the review and recommendation of changes to the College's processes for identifying and electing prospective Fellows. At its March 31, 2022 meeting, the College's Board adopted a resolution that encouraged the Board of Regents to ensure that each Circuit Admissions Council, the Judicial Fellows Nominating Committee, and the International Fellows Nominating Committee have at least one member who qualifies or identifies as diverse and provides "that each Circuit Admission Council, the Judicial Fellows Nominating Committee, and International Fellows Nominating Committee should examine its processes to ensure that qualified diverse candidates are included in the pipeline for nomination and are timely considered." By further resolution, the Board directed the DEI Committee to recommend to the Board the adoption of a policy based on the so-called "Rooney" and/or "Mansfield" rules in order to promote the identification and selection of diverse candidates as Fellows. With these resolutions in mind, the Internal Subcommittee established as one of its top priorities a thorough review of the nomination policies and procedures of the Circuit Admissions Councils in order to ascertain potential barriers to diversity in the nomination process and to develop

recommendations for improving the process.

The Internal Subcommittee anticipates that this review will be accomplished through a multilevel data collection process encompassing: a) personal interviews with members of the Board of Regents, as well as co-chairs of the Circuit Admissions Councils, regarding the nomination process; b) personal interviews with each of the DEI Committee representatives on the Circuit Admissions Councils about the process and attention to diversity; and c) a survey/poll of all Circuit Admissions Council members. The interview and survey questions are being formulated with the assistance of Dr. Beth Wiggins, and DEI consultant Dr. Arin Reeves. The Subcommittee expects to have the data compilation completed in the coming months and to begin developing recommendations for improvement immediately thereafter. It also will conduct a separate review of nominations procedures for prospective judicial and international Fellows in 2023. And finally, after presenting recommendations to the full DEI Committee concerning the process for nominating Fellows for admission to the College, the Internal Subcommittee expects to review and make recommendations 1) for improving diversity in leadership positions within the College and 2) regarding DEI training and education for College leadership and new Fellows.

External Subcommittee

Members: Jane Kim (Chair), Paula Beran, Leyza Blanco, Demetra Liggins, David Payne, Hon. Kathy Surratt-States, and Hon. Deborah Thorne

The External Subcommittee makes recommendations to the full DEI Committee

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A Warm Welcome to Class 34

*Patricia Redmond, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
Chair, Board of Regents*



After working diligently since March 2022, the Board of Regents met at the Fall meeting of the College in Orlando, Florida on October 19th to consider the selection of the new Fellows of Class

34. During those six months since March, Regents, members of the Circuit Admissions Councils and hundreds of Fellows participated in the demanding nomination process resulting in an invitation to 39 insolvency professionals to join the College as Fellows. These Fellows will be inducted at the Annual Meeting in Washington, D.C. on March 24, 2023.

Last year, Charlie Beckham reported that the Board of Regents, Circuit Admissions Councils, the Judicial Nominating Committee and the International Fellows Nominating Committee would “keenly focus on diversity, equity and inclusion in the College and adding youth to our ranks”. Charlie reported being happy to advise that the new Fellows improve the diversity of the College in an effort he hoped would be continued for many years to come. This year’s Class 34 has continued the momentum and over 50% of the new Fellows have diverse backgrounds. This Class also includes four chapter 13 trustees, 12 professionals under the age of 49 and two international professionals including an international judge. Our new international Fellows are from the World Bank and the Singapore

court further extending the College’s global footprint. You may access the complete list of new Fellows by clicking [here](#).

The nomination process requires the highest degree of commitment from our Regents and our Circuit Admissions Councils. The word that kept surfacing throughout our meeting to describe the standards by which the College admits new Fellows was “excellence”. The Board of Regents seeks to invite Fellows that are the best and the brightest restructuring professionals and who have shown a commitment to scholarship, education, paying-it-forward, and to the promotion of DEI professionally and in their community. Each candidate is subject to diligence with respect to each of these qualities.

The meeting on October 19th involved a robust discussion of each candidate with Regents expressing honest and open views. The Regents’ preparation was extraordinary and all participated in the discussion of nominees. This year, with the invaluable input of Judge Erithe Smith (who is the new DEI representative to the Board of Regents), the Regents completed their task of reviewing and nominating 39 new Fellows to the College. The Regents are: John Monaghan (1st), Kelley Cornish (2nd), Natalie Ramsey (3rd), Michael Baxter (4th), Deborah Williamson (5th), Ricardo Kilpatrick (6th), Brian Shaw (7th), Eric Lam (8th), Jennifer Hagle (9th), Mark Craige (10th) and Elizabeth Green (11th). Our Regents-at-Large are Professor Robert Lawless, Judge Clifton Jessup, and Randall

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Doing the Splits

How Many Ways Can a State Tax Foreclosure Sale Raise the Question of “Reasonably Equivalent Value”?

*Annette W. Jarvis, Greenberg Traurig, LLP
Secretary, American College of Bankruptcy*



In 1994, the Supreme Court in *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994) resolved a circuit split in addressing whether the consideration received in a properly conducted mortgage foreclosure sale could be a fraudulent transfer under Section 548 of the Bankruptcy Code. The precise question was whether the consideration paid in the foreclosure sale, which was significantly less than fair market value, “satisfies the Bankruptcy Code’s requirement that transfers of property by insolvent debtors . . . be in exchange for ‘a reasonably equivalent value’” under Section 548(a) of the Bankruptcy Code. In considering (i) the language of the Bankruptcy Code, which uses the term “fair market value” in other contexts, but not in Section 548, (ii) the policy that had coexisted for over 400 years between fraudulent transfer law and state foreclosure law, and (iii) the lack of any explicit indication in the Bankruptcy Code to change existing state law, the Supreme Court held that “reasonably equivalent value” for foreclosed real property is the price in fact received at the foreclosure sale, as long as that foreclosure sale complied with all of the requirements of the applicable state’s foreclosure law. While the Supreme Court based its decision both on a textual analysis and policy considerations, it is the policy considerations that have become the focus in the aftermath of this decision.

The Supreme Court heard *BFP* to resolve a circuit split; yet, ironically, only a few months after the decision was issued, it proved to be the genesis of another circuit split. *BFP* addressed mortgage foreclosure sales, but the Circuits have grappled with how to apply this precedent to tax foreclosure sales. Tax foreclosure sales encompass a completely different procedure from mortgage foreclosure sales and the process differs from state to state, but the questions of what constitutes “reasonably equivalent value” remains an issue in these foreclosures.

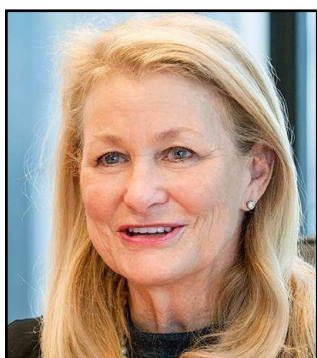
The Fifth Circuit was the first to address *BFP*’s application to tax foreclosure sales with *In re T.F. Stone Co., Inc.*, 72 F.3d 466 (5th Cir. 1995). The sale was challenged under Section 549 of the Bankruptcy Code as an unauthorized post-petition transfer which can be avoided if the sale did not yield “present fair equivalent value,” rather than the requirement of “reasonably equivalent value” used under Section 548. Failing to “perceive a meaningful difference between ‘reasonably’ and ‘present fair’ as applied in the context of [a] forced-sale case,” and even acknowledging the small consideration paid for the property in the tax foreclosure sale through its foreclosure by the taxing authority and subsequent resale, the Fifth Circuit followed *BFP* in determining that the tax sale

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Consultant's Corner: Taking Control in a Disruptive World

*Becky Roof, Managing Director, AlixPartners LLP
Treasurer, American College of Bankruptcy Foundation*



Do a google search on the word "disruption" and a number of synonyms appear: disturbance, c o n f u s i o n , disorderliness, even turmoil and interruption. It is

safe to say that the last two years or so certainly meets these definitions and more. COVID not only exacted a tragic human toll, but mandated shutdowns of industries, disrupted supply chains, caused massive outlays of public spending, and ongoing uncertainty of what's next. This was very unfortunate after a period of relatively steady economic and social gains, increased standards of living, growing free trade and global collaboration, improved modes of transportation and communication, and public health since World War II. But what business leaders currently fear the most is not the continuation of (hopefully) short-term COVID-driven disruptions, but the massive tidal wave of change coming from other forces.¹ A combination of technological innovation, demographic change, climate-driven disruptions, and growing trade barriers are upon us and it is no longer traditional economic forces shaping the economy, but the ever-accelerating pace of change.

Technological Acceleration

While technological innovation will drive economic growth and will improve lives, it

is the primary source of disruption in our world. The 2020s are seeing the merging of human capital with Artificial Intelligence (AI), big data, robotics, and an array of digital technologies to drive next-order business outcomes. In order to thrive, companies need to create collaborative interaction between their technologies, their employees, and their customers.

Demographic Decline

Economic growth depends on one of two things: a growing workforce or improving productivity (defined as technology deployment x capital investment). The 2020s will be the first decade in which leading economies across the globe (Europe, U.S., Japan, and China) will see labor force growth markedly slow and even shrink. (Only India, Africa and parts of the Middle East will see meaningful labor force growth). This will present a major economic headwind, as a third of GDP gains over the last six decades have come from labor force growth. To sustain economic growth levels, productivity growth through technological innovation will have to accelerate even faster.

Climate Transition

The convergence of regulation, dollar flows, and employee and consumer sentiment – not to mention the falling costs of green technologies – will facilitate a move away from fossil fuels. Yet the transition will not be simple, cheap, nor quick. According to Goldman Sachs, \$56 billion in global infrastructure investment is needed to



achieve net-zero carbon emissions by 2050. We have not yet fully appreciated the energy infrastructure required to support our increasingly digital world. We are not ready to support a single large data center that can require as much energy output as produced by an average natural gas-fired combined cycle unit, or the grid loads from the simultaneous charging of the increasing numbers of Electric Vehicles (EVs). Migration from fossil fuels will require patience, discernment, and willingness to effectively navigate the economic consequences. Future market disruption is likely to arise from geopolitical threats, energy availability, and tradeoffs for driving decarbonization responsibly and comprehensively. Power generation, refining, petrochemicals, fertilizers, mining and steel are the areas facing the most impact and assuming the most risk. We should expect a plethora of new technologies and operating models designed to drive a more ambitious and sustainable set of environmental outcomes.

Deglobalization

After three decades of expansion, the barriers are going up. The world's two largest economies, China and the U.S., appear to be on a path of continued confrontation. Across the globe tensions are high elsewhere, not to mention the continued conflict between Russia and Ukraine. Protectionism is on the rise and a long-term supply chain

realignment is picking up speed, reversing more than two decades of falling prices and access to cheap goods. We should expect continued rising prices and inflation, as well as the distinct risk of increased global conflict.


Taking Control in a Disrupted World

Disrupt yourself, before anyone else can. Have the courage to break away from tried and true but rapidly fraying business models. Even when it feels hard. Keep it simple. Paint the vision for disruption – and then disrupt.

Accelerate your digital metabolism. By putting digital at their core and maximizing the creative output of the combination of technology and talent – organizations will literally become the bionic enterprise. Digital is not something you do. It must be who you are. The mission for companies is clear: Be digital or be done.

Create the workforce of tomorrow, today. Companies will HAVE to radically change how they recruit, train, and retain their workforce. These changes include figuring out new ways of attracting more workers from more places than ever before as well as prioritizing diversity and inclusion initiatives. Your workforce is your biggest asset. Investing in it will provide the energy you need to press through the disruption.

Prioritize pace over perfection. It is impossible to overestimate the importance of execution. A decent plan that is implemented with speed and rigor will always outperform a perfect plan executed poorly. Take an action mindset. Be compassionate but candid. And remember, the 2020s are a decade filled with promise, but that promise is the disruption. The winners of disruptions will be the disruptors.

¹As per 3,000 business executives around the globe surveyed by AlixPartners LLP 



Bench Notes: Great Mentors, Great Coaches

Hon. Harlin DeWayne Hale



"While I made my living as a coach, I have lived my life to be a mentor, and to be mentored! Constantly. Everything in the world has been passed down. Every piece of knowledge is

something that has been shared by someone else. If you understand it as I do, mentoring becomes your true legacy. It is the greatest inheritance you can give to others. It is why you get up every day—to teach and be taught."

—John Wooden

This summer I retired as a bankruptcy judge in Texas, having served for almost 20 years. In my last year I had many times to reflect upon my career and the people who impacted it the most. I thought about the president of the bank in my small hometown who let me work during summers to learn about debits and credits, paid and delinquent loans, and dealing with people. I remembered the law school professor who saw enough in me to hire me as his research assistant and then recommend me for a judicial clerkship. I recalled my judge and the clerkship that was full of intellectual challenges, hard work and a lot of fun. And finally, I thought of several judges and older members of the bar who took a shine to me early on, have given me guidance my entire legal career, and who still are my mentors today.

Coach Wooden is right. Mentoring is a lot like coaching. Or maybe certain principles

of coaching can help us be better mentors.

Great mentors and great coaches know how to play.

Kim Mulkey, now women's basketball coach at LSU and former multiple national championship coach at Baylor, was a high school and college basketball star. She was and is a fierce competitor. Players long to play for her because she always tries to do her best and expects no less from her team.

That's the way it is for great mentors. A mentor must be a great player for folks to want to follow. If your work as a lawyer, judge or teacher is not top notch, few people will want to emulate you.

Great mentors and coaches have their players' backs.

Great coaches and great mentors support their people. The 1992-93 the Michigan men's basketball team was fantastic and made it all the way to the Final Four in New Orleans. They were known as the "Fab Five." In the final game against Kentucky, their star player, Chris Webber, made a fatal error and called a timeout when Michigan had none remaining, resulting in a technical foul at the end of the game. Kentucky won. I was there!

After the game the Michigan coach was asked a question which gave him a clear opportunity to throw Webber under the bus for losing the game. Instead, he said he was not upset with Chris Webber, because Webber was the reason the team made it to the finals in the first place. This event was a pivotal moment in Webber's future basketball career and in fact, his life. The following year he was the NBA Rookie of the Year. Quite an accomplishment. While



Webber was not perfect and he had some more ups and downs for sure, blowing the last game for his college team did not define him, largely because of the support of his coach. Imagine what would have happened if his coach made him bear the full brunt of the loss.

In life, as in basketball, mentors have a number of opportunities to encourage, put in a good word for, and pick up their mentees. Don't blow these times! Mentees have a lot of needs and they sometimes stumble. Good mentors and good coaches support their peeps.

Mentorship pays dividends.

Great mentors and great coaches usually get more than they give. When our kids were little, I got to coach their Y basketball

teams for 5-6 years. (Note that the Dallas YMCA does not have a talent requirement for its youth league coaches.) I well up with pride when I see some of my former players now as young men, remembering the first years when they could not dribble and the last ones when they would not stop trying to shoot 3 pointers.

Mentoring is like that. Watching a law student or extern or young lawyer grow into a fully functioning attorney is a sight to behold. As the Bible says, it is better to give than to receive.

Conclusion.

And so you have it. If you mentor (or coach basketball) always bring your "A" game, always have your mentee's back, and always enjoy the ride. 🏀





DEI Committee Collaborates with Focus on Gender Equity: A Women Led Initiative

Shari Bedker

Executive Director, American College of Bankruptcy

Melissa S. Kibler, Accordion

Chair, American College of Bankruptcy



One of the DEI Committee's goals is to partner with other groups to support education and programs to enhance the greater insolvency industry's diversity awareness and activism. On November 14, the College co-sponsored the program "Discussion on Gender Awareness - Striving for Gender Parity in the Restructuring Industry," along with a newly formed group of women representing a

program through the dedicated service of Shari Bedker and her team.

Held at the offices of Kirkland & Ellis, the program had over 160 attendees ranging from managing partners to associates from 90 different firms. The keynote speakers were Dr. Iris Bohnet, a behavioral economist from Harvard University, and Caroline Miller, a leadership coach and educator. Their presentations provided many valuable takeaways to participants, such as:

- Provide advice, not feedback
- "Cover" the surroundings to remove information that could cause relative implicit bias in recruiting and evaluations
- Be aware that self-evaluations can unfairly influence performance management
- Hire and promote in "batches" to enhance diversity
- Remove potential barriers to entry, such as fees or strict experience/education guidelines, to source a broader pool of candidates
- Consider the impact of gender-specific depictions or terminology
- Create a strategic mastermind group
- Be intentional in advocating for and mentoring women and amplify their accomplishments

Edward Sassower, a member of the Kirkland & Ellis Executive Committee and a



cross-section of disciplines in New York's restructuring community. Focus on Gender Equity, led by co-chairs Deirdre O'Connor and Pamela Corrie, collaborated with DEI Committee co-chairs **Paul Harner** and **Judge Erithe Smith** to host an event that brought together decision makers at major firms – male and female – to hear two distinguished keynote speakers discuss concrete steps they can take to support gender diversity. The College provided not only its established reputational credibility but also all the administrative support for planning, marketing and executing the



partner in its Restructuring Group, started off the program by asking, “So why is this important [to Kirkland]? First, it’s the right thing to do. We’re not just about making money, we’re also about trying to make the world a better place. Second, clients sometimes demand it. Although this happens occasionally, it’s not really the biggest driver of our behavior. Lastly and perhaps most importantly, no organization can sustain success if it materially restricts its access to the talent pool. Half of all law students are women. If your firm is not a desirable location for women, then you are cutting off access to half of the talent pool. It’s a losing formula.”

College Chair **Melissa Kibler** shared remarks about the College’s journey through the establishment and work of the Select Commission on Diversity, Equity & Inclusion and the impact of the various resolutions passed by the College and Foundation boards as a result of its efforts. She concluded by noting, “We are at a historic moment as an industry. The work that the College and other organizations have done has the potential to be truly transformational. We need to recognize our collective power to truly make a difference in enhancing diversity, equity and inclusion in our profession – and by extension in our society. Only through being committed to using that power and leading on this issue will the path that has been laid out before us become a reality.”

Kelley Cornish, Second Circuit Regent and a member of the DEI Commission, shared her views about the importance of the event: “As we all know, focusing on gender parity, in general, is not a new concept. It has been the topic of training programs and panel discussions and the like for decades! And we’ve made real progress, to be sure...



But it is unquestionably the case that – like at Paul, Weiss right now – our incoming associate classes are comprised of roughly equal numbers of men and women. But when I look around me in the senior ranks of our profession, or even a generation below me, there are relatively very, very few women who are prominent in our field. There are many complicated reasons for this, to be sure. But we need to push forward and do better. As you will hear today, we must be intentional about it. It must become an imperative for all of us.”

Following the keynote speeches, Jessica Liou, a partner at Weil Gotshal, gave an impactful closing presentation, in which she commented as follows:

“(T)here are three things I take away from this program: (i) knowledge, (ii) hope and (iii) action....Programs like this—conversations like this—give me hope. Looking around this room, I am immediately struck by two things. First, I am struck by the number of women here. This is in stark contrast to my experience as a young associate more than a decade ago attending my very first hearing in the SDNY Bankruptcy Courthouse. Walking into that packed courtroom, I saw an intimidating sea of men in blue suits. I felt

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[From the Chair continued from page 2](#)

The College has also remained an important institutional voice in the efficacy of our system of insolvency in the United States, most recently joining Fellows **Daniel Glosband**, **Jay Westbrook**, and **Judge Allan Gropper (ret.)** in filing an amicus brief in the Eleventh Circuit Court of Appeals on the issue of whether the eligibility requirements of section 109(a) of the Bankruptcy Code apply to a foreign debtor in a chapter 15 case.

These and other activities don't happen without a lot of work and dedication from our Fellows. So thank you to those who have been involved. And if you want to be more involved, it is that time of year. Our nominating committee has been formed and is beginning its deliberations. We welcome both self-nominations and recommendations regarding other candidates for consideration. Or to become a member of a committee, just reach out directly to the chair to find out more about volunteer opportunities.

Most in our industry agree that we are early in the restructuring cycle and that economic and credit stress are building. The sustained impacts of labor shortages, rampant inflation, rising interest rates, continued supply chain disruptions and geopolitical uncertainty have resulted in fundamentals that are worsening by the day. Both consumer sentiment and business confidence are trending downward. Economists are predicting real GDP contractions in the United States during the first half of 2023 and slowing growth globally. Downgrade activity, distress ratios and bankruptcy filings are creeping up. In an informal poll at an NCBJ panel on disruptions in the marketplace, virtually all audience members agreed that the US already is in a recession or will be by mid-2023. Against that backdrop, the services of our Fellows, and in turn the College, will again be fundamental to providing relief and resolution to many individuals, businesses and their stakeholders. 🏛️

Tales From the Crypt-O Panel at 2022 Fall Luncheon: Mohsin Meghji, Vince Lazar and Hon. Martin Glenn





[The College and DEI continued from page 11](#)

with respect to the development and support of “pipeline” programs that advance the College’s DEI objectives in the greater bankruptcy and insolvency community; reviews and makes recommendations specifically designed to assist Circuit Admissions Councils in creating pathways to excellence for diverse professionals; and monitors the DEI activities of restructuring industry organizations such as ABI, NCBJ, IWIRC, and the newly formed Bankruptcy Consortium Diversity, Equity, and Inclusion Coordinating Committee.

In this connection, during our October meetings in Orlando, the DEI Committee and External Subcommittee sponsored two well-attended “outreach” events: First, during the IWIRC annual meetings immediately preceding the NCBJ conference, the DEI Committee hosted a College/IWIRC “intermezzo” – a mixer/meet-and-greet event focusing on IWIRC members with 5-10 years’ experience – that offered an opportunity to meet with and hear from our Fellows about how to distinguish themselves as professionals and be recognized as leaders in the insolvency community. And second, the DEI Committee sponsored an invitation-only pre-reception immediately before the NCBJ opening reception. That event offered select College Fellows the opportunity to connect with rising diverse attorneys and law students, including NCBJ and ACB Blackshear Fellows and Alums, Next Generation Class and Alums, NCBJ JTB Fellows, and Trial Skills Participants, as well as first-time NCBJ attendees.

In order to better engage Fellows in the DEI objectives of the College, the External Subcommittee, in coordination with the Communications Subcommittee, is also in the process of developing a “pledge” program in which Fellows are encouraged to make a

small but important personal commitment to reach out to a diverse professional at least once a quarter. Participating Fellows will be provided with a list of diverse mid-level bankruptcy/insolvency professionals in order to facilitate interaction. Subcommittee member Paula Beran is spearheading this project and is working closely with the Communications Subcommittee.

Finally, the External Committee continues to coordinate important DEI-related activities with the American College of Bankruptcy Foundation. On March 31, 2022, the Foundation Board passed resolutions in which it a) set a goal of allocating at least 25% of funds budgeted for grants to pro bono legal services organization to those that support diverse communities and DEI initiatives, and b) directed the Foundation’s Executive Committee to work with the Board Executive Committee and the DEI Committee regarding the funding of pipeline projects. The Board approved the resolutions on April 1, 2022. The DEI Committee and the External Subcommittee are working closely with the Foundation’s leadership regarding the implementation of those resolutions. The External Subcommittee continues to work intensively, moreover, to: a) develop a formal DEI mentorship program; b) identify and make recommendations regarding so-called “pipeline” programs for diverse law students and insolvency professionals; and c) in close coordination with the College’s Education Committee, identify and/or create speaking opportunities for diverse professionals

Communications Subcommittee

Members: Omar Alaniz (Chair), Karen Giannelli, Hon. Enrique Lamoutte-Inclan, Sam Maizel, Nina Parker, Sandy Qusba and Kristina Stanger

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The Communications Subcommittee reviews and makes recommendations with respect to all communications relating to the DEI Committee's objectives, programs, and projects, as well as content on the DEI page of the College's website and relevant social media. This Subcommittee also assists and supports the Internal and External Subcommittees in the planning and implementation of College-sponsored DEI programs. In this regard, the Subcommittee works closely with our DEI Consultant, Dr. Arin Reeves, to adopt and implement best communications practices.

The Subcommittee is currently focused on developing a communications/marketing plan for the External Committee's pledge project. Specifically, the Subcommittee is exploring ways to create interest, excitement and "buzz" by using a snappy acronym for the program and disseminating "teasers" through social media posts, emails and the College website. It is expected that the program will officially launch in early 2023.

The Communications Subcommittee is continuing to explore ways to market and promote the activities of the DEI Committee both within and beyond the College's membership; to monitor, maintain and update content on the Committee's DEI tab on the College's website; and to promote the College's DEI initiatives on responsibly on various social media platforms.

College-Wide Engagement and Beyond

The Committee has actively pursued its mandated objectives both within and beyond the College:

- On April 1, 2022, the Board approved the recommendation of the Select Commission that the College establish a Freshman Fellow Program to assist in the

successful integration of new Fellows into the College, broaden their understanding of the College and its resources, and expand their networks by connecting them to key leaders in the College. The Freshman Fellow Committee is now functioning and includes three members of the DEI Committee, who have been coordinating with the full Committee to, among other things, provide appropriate DEI training to new Fellows.

- The DEI Committee is proud to have partnered with Just the Beginning – A Pipeline Organization (JTB). At the recommendation of the DEI Committee, the College entered into a Memorandum of Understanding with JTB to extend financial support to its 2022 Summer Judicial Internship Diversity Program, which provides law students from socioeconomic, ethnic, and cultural backgrounds underrepresented in the legal profession with summer judicial internships around the country. The College provided stipends to six law students interning with bankruptcy judges.

- We are working closely with "Focus on Gender Equity: A Women Led Initiative." This relatively new group includes professionals representing a cross section of disciplines in New York's restructuring community whose objective is to advance women professionals in the restructuring industry. At the recommendation of the DEI Committee, the College co-sponsored the group's inaugural event, "Discussion on Gender Awareness – Striving for Gender Parity in the Restructuring Industry," which took place in New York on November 14, 2022.

- The Blackshear Presidential Fellows Program is the flagship diversity pipeline program of the National Conference of Bankruptcy Judges. For more than 20 years,

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[The College and DEI continued from page 22](#)


this program has recognized exceptional diverse lawyers (in practice for 2-10 years) whose practice is at least 50% in the insolvency area. There are currently three sitting bankruptcy judges who are former Blackshear Fellows. The College, through the DEI Committee, partnered with NCBJ

to provide funding for three Blackshear Fellows to attend the 2022 NCBJ conference in Orlando. These recipients were publicly designated as “American College of Bankruptcy Presidential Blackshear Fellows.”

Diversity, Equity and Inclusion Excellence Award

Earlier this Fall, the Executive Committee approved the unanimous recommendations of the DEI Committee to name its previously established annual award the “Diversity, Equity and Inclusion Excellence Award” and to grant the inaugural award to DEI Select Commission Co-Chairs Judge Laurel Isicoff and Judge Jeffery Hopkins. Judges Isicoff and Hopkins were presented with the award at the All Fellows Luncheon on October 19, 2022, in conjunction with the College’s annual Fall meetings. We join the entire membership of the College in thanking them for all that they and their fellow commissioners achieved and heartily congratulate them on the occasion of their receipt of this very special honor.

As we hope you will agree, your DEI Committee has been very busy and has already made significant progress. There is so much more to be done but we are confident that in time we can achieve all of the College’s DEI objectives, however complex and difficult the challenges may be, with the continued input and support of the Fellows.

Whither from here? Upward! And as always, if you have any comments, suggestions or concerns regarding the DEI Committee or its ongoing work, feel free to contact one or both of us at erithe.smith@cacb.uscourts.gov and pharner@sheppardmullin.com. 





[A Warm Welcome from page 12](#)

Eisenberg. The Chair of the Judicial Nominating Committee is Paul Singerman and the Chair of the International Fellows Nominating Committee is Luis Manuel Mejan.

Our Future

The future of the College is bright and getting brighter. In addition to the nomination process in which the Regents engage, each Regent was also tasked with implementing a pipeline for their circuit to identify and mentor potential new Fellows from diverse backgrounds, from all geographic areas of the circuit and from all professions. I could not be more proud of the work the Regents performed in this regard. The Regents have implemented frameworks to identify outstanding young practitioners, to watch their professional growth and to mentor those practitioners to be invited to be Fellows in the future. Some of the new Fellows of Class 34, were being watched for a number of years and upon reaching the minimum requirements

for fellowship, i.e. fifteen (15) years of practice, were immediately nominated and will be inducted this Spring. The Regents have additionally identified states within their circuit where fellowship in the College is underrepresented and targeted their pipeline to correct that imbalance. The pipeline is making sure that, among other objectives, diverse candidates are given opportunities to excel and demonstrate that they are the best and the brightest of our profession.

A Huge Thank You

As this was my first year as Chair of the Board of Regents, I cannot overstate my thanks to Melissa and Charlie for their constant advice and counsel during this process. As I commented earlier, I had Melissa and Charlie on speed dial throughout. I would also like to thank each of the Regents and the Chairs of the Judicial Nominating Committee and the International Fellows Nominating Committee who worked tirelessly to identify candidates, conduct due diligence on those candidates and define their processes in a way that will assist their successors in performing the daunting task of reviewing nominations and candidates in the future.

Last, but certainly not least, I would like to thank all the Fellows who spent hours, days and weeks preparing comprehensive nomination packages for Class 34, which made all of our jobs so much easier.

I look forward to seeing everyone in D.C. and I hope you have a happy, healthy and safe holiday season. 🙏





[President's Message from page 5](#)

I walked the twenty paces across the hallway and said:

ME: "Excuse me, Governor."

THE ROOMMATE: (Rising with the confidence of a man who may be broke but was not broken and looking me in the eye.) "Yes Sir?"

ME: "I'm Charlie Beckham. I clerked for Judge Woodward a few years ago. We used to talk on the phone some when I was clerking for the Judge. I saw you over here and I wanted to introduce myself."

GOVERNOR CONNALLY: (Not quite remembering who I was, but with the ease of a Texas politician and looking a little relieved.) "Well yes, Charlie, I remember you. You must be a practicing lawyer now. Are you here for my case?"

ME: "No sir. I'm here for a different matter. I just wanted to say Hello."

We continued talking for a few more minutes until Governor Connally's lawyer and others showed up to do their business. I went about mine.

I was reminded that day, and have remembered ever since, that debtors are

not Rogues, Rascals and Rattlesnakes but sometimes folks of integrity, honesty and virtue who have fallen on tough times. Despite the circumstances we need to treat all folks we meet in bankruptcy with civility and professionalism.

In the Governor's bankruptcy, an auctioneer was hired to auction off the possessions that the Governor and Mrs. Connally had acquired over a lifetime. Knowing that the market value of their property would be enhanced by their personal presence, Mrs. Connally and the former Governor of Texas, the former Secretary of the Navy, the former Secretary of the Treasury attended the auction in person to verify the provenance of many of the items. The crowd was robust and the auction in January of 1988 netted far more than expected. The Governor and Mrs. Connally chatted with many of the bidders about the items being sold. The proceeds of the auction didn't wipe out millions of dollars of debt but showed how all debtors can move forward to a fresh start. And it reminds us to not label our clients or our adversaries as Rogues, Rascals or Rattlesnakes until we get to know them a little bit better in hard times. ¶

[From the Foundation continued from page 6](#)

If you have any questions about what you have given in the past, all you need to do is look under your profile on our website, and you will see your giving history. Jenny, Vince Lazar, your Circuit Leaders and I are

available to answer your questions, so don't hesitate to ask.

And with that, I will sign off and wish you a happy holiday season as we move into the holiday season filled with Hanukkah, Christmas, and New Year's Day! ¶



[The Splits from page 13](#)

transfer of the property, acknowledged to be “noncollusive and conducted in conformity with Oklahoma law—satisfied § 549(c)’s requirement that the sale be ‘for present fair equivalent value.’” *Id.* at 472.

The Tenth Circuit weighed in next in interpreting state fraudulent transfer law in *In re Grandote Country Club Co., Ltd.*, 252 F.3d 1146 (10th Cir. 2001). The case tells the story of a convoluted history of transfers of a golf course back and forth to parties in Japan. The transfer trail ends with a trustee in bankruptcy proceedings in Japan seeking to sue the purchaser of tax certificates who obtained a tax deed to the property under the Colorado Uniform Transfer Act (CUPTA) in a case brought under former Section 304 of the Bankruptcy Code (now repealed and replaced by Chapter 15). Recognizing a split in the lower court decisions on whether *BFP* applied to tax sales, the Tenth Circuit, in applying *BFP* to “conclude that the tax sale at issue constitutes transfer for ‘reasonably equivalent value’ under CUPTA,” notes the critical fact that under Colorado law, the tax sale was conducted publicly and was “subject to a competitive bidding procedure.” *Id.* at 1152. The Tenth Circuit distinguished a prior case decided by the Tenth Circuit Bankruptcy Appellate Panel in *Sherman v. Rose*, 223 B.R. 555 (B.A.P. 10th Cir. 1998), which refused to apply *BFP* to a Wyoming tax sale where Wyoming statutes “do not permit a public sale with competitive bidding.” *Id.* at 559.

Turning back to Section 548, the Seventh Circuit then created the circuit split in deciding *Smith v. SIPI, LLC*, 811 F.3d 228 (7th Cir. 2016). As previewed in the Tenth Circuit’s discussion in *In re Grandote*, the Seventh Circuit considered the process set up under Illinois law for a tax sale and

determined, “[b]ased on fundamental differences between the bidding methods used,” that “the reasoning of *BFP* does not extend to Illinois tax sales of real property.” *Id.* at 234. Explaining the Illinois procedures as not involving “competitive bidding where the highest bid wins,” but rather a procedure where the claim is sold and the “lowest bid wins,” the Seventh Circuit held that *BFP* did not apply to this tax foreclosure sale. *Id.* Characterizing *BFP* not as a textual interpretation case, but rather as a case based on “practical concerns about how to let federal bankruptcy law work well with state mortgage foreclosure law,” the Seventh Circuit confined *BFP*’s application only to “mortgage foreclosures of real estate,” citing the decision itself when it noted that “[t]he considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different.” *Id.* at 236. The Seventh Circuit noted that the states in which the application of *BFP* to tax foreclosure sales had been decided differently had open competitive bidding, and thus were more like the mortgage foreclosure process. *Id.* at 240.

The Ninth Circuit weighed in next in *In re Tracht Gut, LLC*, 836 F.3d 1146 (9th Cir. 2016), following the developing majority view in extending *BFP* to California tax foreclosure sales. However, the Ninth Circuit recognized that it faced the same situation as in the Fifth and Tenth Circuit because the “California tax sales have the same procedural safeguards as the California mortgage foreclosure sale at issue in *BFP*” *Id.* at 1149. The Ninth Circuit interpreted *BFP* as focused on policy issues finding that “[t]he Court reasoned that if debtors were able to avoid mortgage foreclosures under federal bankruptcy law simply because the property was sold for

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below market value at the foreclosure sale, the state regulatory regime in which creditors can conduct forced sales on foreclosed property would be frustrated.” *Id.* at 1153. Determining that “[t]he Court’s rationale also applies to tax sales,” the Ninth Circuit noted that in the area of real estate, which has traditionally been state based, the “federal courts should pay considerable deference to state law. . . .” *Id.* (citing *In re Tracht Gut, LLC*, 503 B.R. 804, 816 (9th Cir. B.A.P. 2014)). The Ninth Circuit also referenced its earlier decision in *Bailan v. Bledsoe*, 569 F.3d 1106 (9th Cir. 2009), in which it extended *BFP* to a state court’s dissolution judgment “following a regularly conducted contested proceeding” which the Ninth Circuit found conclusively established “reasonably equivalent value” for purposes of Section 548.” *Id.* at 1112. In that case, the Ninth Circuit found that the “state’s traditional interest in the regulation of marriage and divorce is at least as powerful as its traditional interest in regulating sales of real property.” *Id.* at 1112. Distinguishing decisions which did not extend *BFP* to tax sales, the Ninth Circuit found these decisions were decided “because of identified deficiencies in the tax sale procedures of the states in question.” *In re Tracht Gut*, 836 F.3d at 1154.



In *Hackler v. Arianna Holdings Co.*, 938 F.3d 473 (3d Cir. 2019), the Third Circuit then faced the question of the applicability of *BFP* to New Jersey tax sales under Section 547. The tax sale transferee argued that the policy of *BFP* applied to protect properly conducted tax sales under state law even under the preference statute. The Third Circuit declined to so extend the reasoning of *BFP* to tax sales challenged as preferences under Section 547 both on textual and policy reasons. Finding that “federalism concerns . . . cannot overcome the plain language of the Bankruptcy Code,” the Third Circuit noted that “reasonably equivalent value,” the cornerstone of the issue in *BFP*, was not found in Section 547. *Id.* at 475. Further, because “at New Jersey tax sales the public bids only on the rate of interest on the unpaid taxes,” the Third Circuit found these procedures would not meet the concerns with procedures of the sale underlying the

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BFP decision. *Id.* at 479.

Next, the Sixth Circuit in *In re Lowry*, No. 20-1712, 2021 WL 6112972 (6th Cir. Dec. 27, 2021) addressed the question of the extension of *BFP* to tax foreclosure sales under Section 548 in the context of Michigan law. Rejecting the extension of *BFP* to Michigan tax foreclosure sales, the Sixth Circuit noted:

The tax foreclosure process here was also significantly different from the mortgage foreclosure system in *BFP*. . . . In contrast, the Michigan foreclosure law here permitted the local government to purchase the property, without a public auction, for the “minimum bid.”

Id. at *4.

Again, focusing on policy arguments, the Sixth Circuit found that “when a tax foreclosure sale focuses on the value of the taxes owed rather than the value of the property,” it is not an equivalent process as a mortgaged foreclosure that focuses on the value of the property even though the sale occurs in “not-purely market conditions.” *Id.* Thus, the Sixth Circuit reversed the lower court’s dismissal of the Section 548 claim and remanded the case for further consideration.

This controversy continues today. Earlier this year, the Second Circuit made its position known on this circuit split just this year in *Gunsalus v. Cnty. of Ontario, New York*, 37 F.4th 859 (2d Cir. 2022). This case involved a tax lien in New York and a suit again addressing whether the properly conducted tax sale yielded “reasonably equivalent value” under Section 548 of the Bankruptcy Code. Under New York law,

the taxing authority could simply foreclose on the property, transferring title to itself and then resell the property, which is what occurred in this case. Focusing again on the policy issues underlying the *BFP* decision, the Second Circuit said of the Supreme Court’s decision in *BFP*: “Critical to that conclusion was the existence of an auction or sale which would permit some degree of market forces to set the value of the property even in distressed circumstances.” *Id.* at 865. Accordingly, the Second Circuit held that *BFP* covers only mortgage foreclosures and not tax foreclosures. In furtherance of its policy focused analysis, the Second Circuit also noted that the applying *BFP* to this tax foreclosure situation would be “fundamentally at odds with the goals of bankruptcy law” including preventing “a windfall at the expense of the estate” and “Congress’ policy choice that ‘reasonably equivalent value’ must be obtained for a transfer of a debtor’s property in the bankruptcy context.” *Id.* at 866. With respect to the argument that the failure to apply *BFP* would upset the tax foreclosure state system, the Second Circuit concluded: “By its very nature, the Code upsets common and state law property interests and recalibrates the relationship between debtors and creditors.” *Id.*

Thus, *BFP* provided no clear answers to the avoidability of tax foreclosure sales under Section 547, 548 and 549. While a circuit split has been created, and a new focus has been placed on the many ways state laws address tax foreclosure sales, the policy considerations of every Circuit Court that has considered the issue are remarkably similar. ¶



5th and 10th Circuit Meeting in Park City



2023 DUES

For 2023, the Board approved increasing dues to the following levels:

Regular	\$500
Academics	\$250
Consumer Practitioners	\$175
Judges/Other Government	\$125

Dues were last increased in 2011. In reaching this decision, the Board and Finance Committee gave careful consideration to several factors, including the following:

1. Costs have increased significantly since the last dues increase, particularly given recent inflationary pressures;
2. The updated dues structure is consistent with or lower than that of comparable organizations; and
3. The reach and scope of the College's and the Foundation's work has increased substantially, particularly in the areas of DEI, education and grants.

Invoices will be sent to Fellows in January 2023. We appreciate your membership and support!



[Pro Bono continued from page 7](#)

bankruptcy issues, collections, foreclosure, and housing. Their outreach methods and project address the language barriers and rural service area by physically and virtually being in the communities where a large majority of the target population resides.

- Emergency Legal Responders (ELR) in New Orleans works to bring disaster-related legal aid to socially vulnerable groups throughout the state of Louisiana. ELR will utilize the funding to update its bankruptcy materials to more explicitly reflect bankruptcy's place in the disaster timeline of need, to disseminate those materials via its social media channels and to host a free legal clinic on bankruptcy. After a disaster, the timeline of legal need follows a familiar pattern - in the first six months, people encounter unemployment issues and landlord/tenant disputes; in six months to a year, people face insurance disputes and foreclosure issues, in the following year and for many years thereafter, people contend with flood insurance disputes; FEMA recoupments; succession/probate issues and bankruptcies linked to the initial disaster.

- Legal Aid Society of Greater Cincinnati, its affiliate Legal Aid Society of Southwest Ohio, LLC, and its affiliated pro bono program, the Volunteer Lawyers Project (VLP) will use our funding to continue recruiting volunteer attorneys help low-income consumers in Southwest Ohio in need of Chapter 7 bankruptcy who cannot afford to hire private attorneys.

- Nashville Conflict Resolution Center (NCRC) was founded by the Nashville Bar Association and has served the region for 22 years. They work closely with General Sessions Courts to provide free mediation for debt-related cases to relieve overcrowded

dockets and to assist litigants (primarily pro se) in finding cooperative solutions that support financial stability for all involved. In Davidson County, NCRC staff is in court four days a week with pro bono mediators, who donate their time to resolve cases. They have mediated as many as five cases per day from the General Sessions docket and schedule other cases as required, either in person or using remote video conferencing. With the help of ACBF's support, they estimate that they will provide free mediation services to at least 250 debtors and creditors over the course of the grant year, and that at least 85% of their cases will end in a collaborative agreement.

- Veterans Legal Services, Inc. in Boston. Veterans and current service members are often targets of predatory lending and financial exploitation. Often, VLS learns of these issues after the veteran had a disabling event or exited military service and can no longer keep up with the high-interest payments. With this grant, VLS will organize and run trainings in conjunction with the BBA's Bankruptcy Law Section to educate and recruit additional private practice attorneys and law students about consumer debt and finance issues unique to veterans in Massachusetts.

Michael L. Cook Grant Award. The Foundation established the Michael L. Cook Extraordinary Grant for a program that is "such an innovative and exemplary approach to a previously under-served area of need as to justify an extraordinary grant in excess of the grant limits customarily applied by the Foundation." The budget for the Cook Grant is \$15,000. This year the Committee selected a new grantee, Innovation for Justice. Innovation for Justice is a social justice innovation lab housed at

[continued on page 31](#)



[Pro Bono continued from 30](#)

the University of Arizona James E. Rogers College of Law and the University of Utah David Eccles School of Business, and has partnered with AAA Fair Credit in a two-year pilot that will train nonlawyer medical debt legal advocates (MDLAs) to provide free, limited scope legal advice to people experiencing medical debt. This is the first pilot in the U.S. to incorporate nonlawyer limited-scope, medical-debt-related legal advice into social services. During the pilot phase, the MDLA will be qualified to provide limited-scope legal advice to medical debt defendants upon completing an MDLA curriculum and passing an exam within that curriculum. Defendants in medical debt collection actions will be notified of the availability of MDLA services at the time they receive a 10-day summons. The MDLA curriculum also includes extensive training on bankruptcy law: the MDLA will be able to provide limited-scope legal advice to clients considering declaring bankruptcy due to their medical debt and help clients determine whether referral to a bankruptcy lawyer would be helpful.

Our First DEI Grant. The Foundation's Pro Bono Committee will be expanding its role in 2023 and will be reviewing grant requests for DEI initiatives. I am pleased to report that the Pro Bono Committee received a grant application that it felt was worthy of consideration by the Foundation for a DEI grant, even though we had not yet formally expanded our mission and solicited applications, and presented it to the Foundation. The Foundation approved a \$7,500 grant to the Federal Bar Association for the Eastern District of Michigan (FBA). The FBA has made it a part of its mission to work with the community to build a pipeline of diverse talent in the legal profession. In

furtherance of that goal, the Bankruptcy Committee of the FBA created a program offering internships with bankruptcy courts within the district and with the Clerk of Court's office. The Bankruptcy Committee will use the Foundation's grant to fund (i) two law clerk internships (for diverse law students) with the United States Bankruptcy Court for the Eastern District of Michigan, and (ii) one internship (for a diverse undergraduate student) with the Clerk of Court's office. Interns will receive compensation during their internship from the grant funds, which compensation can be used to pay the intern's living expenses. The Bankruptcy Committee hopes to offer these internships annually going forward. This Foundation grant builds upon grants from the College in 2022 to the Just the Beginning program funding stipends for six diverse interns to bankruptcy judges and the NCBJ Blackshear Fellows program funding conference attendance for diverse young attorneys.

Conclusion. This is my first year having the privilege of serving as the Pro Bono Chair, and I thank you for the opportunity. It has been a pleasure serving with the over 40 members of the Pro Bono Committee, the College and Foundation Boards and leadership, and Jenny Cudahy and Shari Bedker – all of whom spend significant time in this effort. And a special thank you to all of the Fellows who generously donate their money and time to this very worthwhile project. You have all made it possible for many to serve the most vulnerable populations across the country. I urge you to not only continue to donate and make these grants possible, but to also encourage organizations that fit our pro bono and DEI guidelines to submit applications for 2023 grants by June 1. ¶



[Focus on Gender Equality from page 19](#)

noticeably out of place, as a young female lawyer and as a woman of color. I questioned whether I would ever feel like I belonged in this industry. I am happy to report that although I still experience those moments, it has become increasingly more common that I am not the only woman in the room, or the only person of color—that is progress and I celebrate it.

The second thing that struck me is the number of men here today. To the men, your presence speaks volumes. You may not always know the power you hold by simply being present, but society and political, financial and business institutions—indeed the long arc of history—have all bent in your favor. To support an event like today’s is a deliberate act on your part to help recalibrate that arc. You affirm me and the many other women in this room today by your presence, and, importantly, you affirm that the heavy lift of seeking gender parity is not one to be borne by women alone. You are an ally in that fight.

But, the knowledge and hope that we’ve gained today are not enough; and truth be told, events like this — as necessary as they are, are not sufficient. Achieving gender parity and fighting unconscious bias requires deliberate, thoughtful action. Sometimes, it demands action through grand gestures. But where the rubber meets the road, where the lasting progress will be made in achieving gender parity in the restructuring industry is in the decisions we make day to day, moment by moment. The best sponsors and mentors I’ve had, like Gary Holtzer and Ronit



Berkovich, understand that meaningful change is the result of persistent, small, accumulated changes over time. Acts like copying into client emails the female lead associate or junior partner when others forget to do so; highlighting her expertise and capabilities; giving credit to her ideas. Helping her to be seen when so often she is left unseen and her contributions are not appreciated.”

Finally, Fellow **Gary Holtzer** of Weil Gotshal closed the evening by sharing some of his own practices, such as entertaining clients and staff at concerts, which are more universally appealing to men and women, rather than sporting events. He also encouraged attendees to “let others run past you” and “be all right with that.”

Dr. Bohnet’s presentation was recorded and is posted on the Fellows-only section of the website. The one-hour program is highly recommended for all Fellows and is an approved course for new Fellows and leadership to include as part of their diversity training certifications. [The recording can be found at this link.](#) 🏛️



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Focus on Fellows

We invite all Fellows to submit information about awards, news, and/or recent publications. Member highlights will be published on a bi-monthly basis to all Fellows through email or the College Columns as appropriate. If you have news about yourself or a colleague, please send announcements to Michelle Foster, ACB Communications Director, at focus@amercol.org.

Peter C. Alexander published a new book titled "Insufficient Funds: The Financial Life of Frank Lloyd Wright." It is published by Dorrance Publishing in Pittsburgh, Pennsylvania.

Douglas C. Bernstein was named a Fellow of the Michigan State Bar Foundation.

Ogonna Brown was the recipient of the Girl Scouts Take Action badge presented by the Girl Scouts of Southern Nevada.

Robert van Galen published a set of Articles on the new Dutch legislation on preliminary restructuring plans, which was published in the Dutch legal magazine "Ondernemingsrecht". It has been translated into English and the English version has been named: "The act on the confirmation of out-of-court restructuring plans (Wet Homologatie Onderhands Akkoord)." Robert also published a book named "Introduction to European Insolvency Law", which was published by Kluwer. The book discusses the European Insolvency Regulation, the Restructuring Directive and two other directives relating to insolvency law.

Neil Gordon joined Taylor English Duma LLP.

Read an interesting tribute to the life of Jerome L. "Jerry" Kaplan.

Kim Martin Lewis rejoined Frost Brown Todd (FBT).



Dr. Luis Manuel C. Méjan received awards from two Mexican bar associations: the Biennial Award from ANADE: National Association of Business Lawyers, Bar Association and the other from Barra Mexicana Colegio de Abogados, Jalisco chapter.

Bruce A. Markell received the Lawrence P. King Award at the National Conference of Bankruptcy Judges (NCBJ) in Orlando, FL on October 20, 2022.

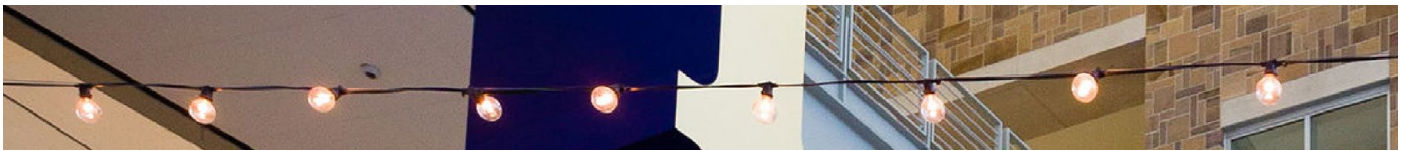
Sam Maizel (Dentons US LLP) was recognized as one of Los Angeles's "Top 100 Lawyers for 2022" by the Los Angeles Business Journal and was given the "2022 Outstanding Nonprofit Lawyer Award" for distinguished service as outside counsel to nonprofit organizations by the American Bar Association's Nonprofit Committee.

Hon. Michael G. Williamson, U.S. bankruptcy judge for the Middle District of Florida, was honored with the 16th annual **William L. Norton, Jr.** Judicial Excellence Award – created by Thomson Reuters and the American Bankruptcy Institute (ABI) – at the National Conference of Bankruptcy Judges (NCBJ) annual meeting in Orlando in October.

Hon. Mr. Justice David Richards was appointed as a Justice of the Supreme Court of the United Kingdom.

Daniel Glosband received the International Insolvency Institute's Outstanding Contributions Award for 2022.

Steven Turner received the Blanchfield Award, which is presented to a nonbanker for contributions to ag and rural banking.



Upcoming Events

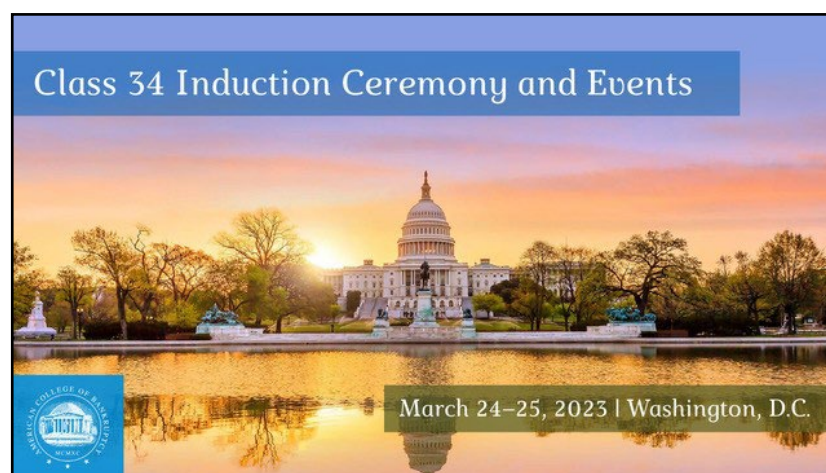
Third Circuit Fellows & Temple University's Bankruptcy Forum Now on January 18, 2023

The American College of Bankruptcy Third Circuit Fellows and Temple University's Beasley School of Law's Bankruptcy Forum has been postponed to January 18, 2023.

[Register Here](#)

ACB Fourth Circuit Moot Court | February 20, 2023

The Education Committee of the DC and Fourth Circuits is pleased to announce a 2023 American College of Bankruptcy Fourth Circuit Moot Court. Please find the application package here. The event is co-sponsored by the American Bankruptcy Institute. We expect to hold the moot in-person at the Prettyman Courthouse, 333 Constitution Avenue N.W., Washington D.C., 20001.



Class 34 Induction Ceremony | March 24, 2023

We are back in Washington, D.C. for the Induction of the 34th Class! The ceremony will be held at the Smithsonian Portrait Gallery Atrium on Friday, March 24, 2023. Committee and Board meetings as well as the education sessions will be held at the Grand Hyatt Hotel, 1000 H Street NW, Washington, D.C. 20001, March 23, 24 and 25, 2023. Event registration will be ready soon!

[Hotel Reservations Here](#)



Email the Editors

We are constantly adding content to the Columns and making other updates. If you have input on what you would like to see here, please email us at:

Deborah Langehennig, trustee@ch13austin.com
Melanie Cyganowski, mcyganowski@otterbourg.com

We value your input. Thank you!

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