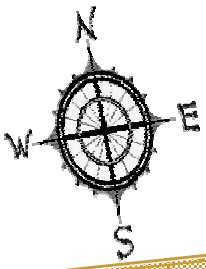
# DUE SOUTH: *PRO BONO BANKRUPTCY REPRESENTATION PROGRAM REINSTATED IN HOUSTON*




*The first in a regular series focusing on news and initiatives of a particular district*

The Houston Volunteer Lawyers Program (HVLP), a committee of the Houston Bar Association, is reinstating its Pro Bono Bankruptcy Representation Program to provide bankruptcy representation to qualified Harris County residents. From 1999 until the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), HVLP was able to match hundreds of low-income debtors with attorneys who could assist them with their bankruptcies. After the effective date of BAPCPA, however, HVLP's pool of pro bono bankruptcy attorneys dried up, leaving HVLP with the difficult decision to suspend its services in this area.

On September 11, 2007, the United States Bankruptcy Court for the Southern District of Texas held in an Amended Standing Order that legal counsel providing pro bono bankruptcy representation are not debt relief agencies on account of such pro bono representation. As a consequence, lawyers and law firms have begun to ease their previous policies against accepting referrals of these cases. Given this holding in the Amended Standing Order and the subsequent renewed interest in pro bono bankruptcy representation in the Houston legal community, HVLP is once again accepting bankruptcy cases for referral.

A number of lawyers have committed to assist HVLP and other agencies in an effort to secure funding for their revitalized pro bono consumer bankruptcy referral serv

ices from a combination of law firm donations as well as bar association and foundation grants. As a result of this assistance, HVLP's bankruptcy program recently received generous support from the State Bar of Texas Bankruptcy Section, which awarded HVLP a $5000 grant to assist it with its immediate goals for the project. These goals include renewing its bankruptcy volunteer panel, preparation of a "how to" manual and a form book, and development of short seminars to educate firm members willing to accept referrals.

For this program to be an outstanding success, HVLP will need additional support from firms in the form of donations and volunteers. For more information about HVLP's Pro Bono Bankruptcy Representation Program, please contact HVLP Executive Director David Mandell, 713-228-0735, ext. 108, david.mandell@hvlp.org, or Paul Mott, HVLP Senior Attorney and Program Coordinator, 713-228-0735, ext. 110, paul.mott@hvlp.org.

**Editor's Note:** *The referenced Amended Standing Order of the United States Bankruptcy Court for the Southern District of Texas can be found at http://txbankruptcylawsection.com*

# FROM THE YOUNG LAWYERS COMMITTEE:

## *TIPS FOR FINANCIAL PROFESSIONALS AND ATTORNEYS WHEN WORKING TOGETHER IN BANKRUPTCY CASES*

*By Eli Columbus* and Roberto Cortez***

While every bankruptcy case is governed by the same fundamental set of rules, the legal and financial professionals are typically different in each case. Given this dynamic, effective communication among the professionals during a bankruptcy case can be a determining factor between success and failure.

Financial professionals interact with lawyers every day, but the financial professional and lawyer do not necessarily speak the same language or have a full appreciation for what each other knows or needs to know during a case. Recognizing and understanding the differences in how financial professionals and lawyers view and approach issues in a bankruptcy case leads to the creation of a beneficial relationship, where case issues are effectively and efficiently evaluated with respect to the potential impact of the issues on the analyses performed by the financial professional. Below are some guidelines financial professionals and lawyers should follow in order to foster an effective working relationship during a bankruptcy case.

Financial advisors should keep the following guidelines in mind as a bankruptcy case proceeds:

1. Do not expect counsel to review the case docket for you. While attorneys may apprise you of significant filings, it is important to understand the positions that all parties are taking, as it can impact the financial assumptions that need to be made. The information that counsel gives you may also be limited to what they consider to be legally, but not necessarily financially, significant or relevant. By periodically reviewing the case docket and pleadings, you will have a better understanding of the financial position the parties have taken and the potential impact they have on any assumptions you made in your analyses.

2. Make counsel aware of the scope of your work. Financial advisors are not all the same and do not focus on or specialize in the same areas. Make sure that the attorneys that you are working with have a specific understanding of what you are doing

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# EXPERIENCED BANKRUPTCY LAWYERS NEEDED AS JUDGES FOR ELLIOTT CUP - BANKRUPTCY MOOT COURT

The Bankruptcy Section is seeking experienced bankruptcy lawyers to serve as judges for the third annual Texas/Fifth Circuit Bankruptcy Moot Court Event for the 2008 Elliott Cup. The event is sponsored by the Bankruptcy Section of the State Bar of Texas, and is named in honor of the late Joseph C. Elliott, U.S. Bankruptcy Judge for the Western District of Texas. This year, the Elliott Cup event has been expanded to include law schools in the entire Fifth Circuit, as well as Texas. The Elliott Cup event is designed to serve as a formal practice competition for law school teams that will compete in the National Duberstein Moot Court Competition at St. John's University School of Law in New York City.

This year, the Elliott Cup event will be held on Saturday, February 23, 2008, at the U.S. Bankruptcy Courthouse in Dallas, Texas (1100 Commerce Street). Lawyers will need to be at the Bankruptcy Courthouse by *8:30 a.m. on Saturday, February 23, 2008* to judge the rounds, which should be completed by 1:00 p.m. that day. Scoring for the Elliott Cup event will be based solely on oral argument. Lawyers will be requested to score each competitor and provide constructive input to the teams following each preliminary round. A trophy (the Elliott Cup) will be awarded to the first place team, and awards given to the second place team and best oral advocate.

Participating lawyers are also invited to attend the Team Dinner, where awards will be presented (to be held that Saturday night, February 23) and a Welcoming Cocktail Reception (to be held on Friday night, February 22, from 6:00 p.m. to 8:00 p.m.).

Please consider participating in this event for the benefit of future bankruptcy lawyers in the State of Texas and Fifth Circuit.

***If you are willing to serve as a judge for the 2008 Elliott Cup, please mark your calendar with the date of February 23, 2008, and provide your name, phone number, and email address to the Elliott Cup Chairperson:***

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## Tips for Financial Professionals

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and why you are doing it. Even though the client is ultimately managing the professionals, you can help the case proceed more efficiently by making sure that lawyers and financial advisors are aware of what information the other has and what they can get, so as to avoid walking down divergent paths. The professionals need to identify the common goal that we are working towards.

3. Do not prepare your analysis in a vacuum. It is important to consider the legal issues that may impact your analysis, and frequently attorneys need to make legal interpretations or evaluations before you proceed. As you prepare your analysis, discuss any underlying assumptions with counsel (and the client, as appropriate) in order to make the assumptions consistent with the legal arguments that counsel has made or is preparing to make.

4. Inform counsel of the key elements and assumptions of your analysis. Every analysis is meant to answer a question. Each question may have different answers depending on the assumptions made. Varying assumptions can change any financial analysis, so it is important to make counsel aware of the sensitivity of your conclusion to the assumptions that you are making. Understanding which assumptions have the largest impact on an analysis helps to identify which legal arguments may arise from third parties and may help counsel more fully evaluate the legal implications of the financial picture.

5. Talk…often. Frequent communication avoids surprises and allows all parties to resolve open items before they become problems or, even worse, all-nighters. Different perspectives stimulate creativity and create solutions to questions the other party may not have even known existed.

Attorneys should keep the following guidelines in mind as a bankruptcy case proceeds:

1. Keep the financial professionals informed during the case. As outlined above, attorneys do not always know when certain issues or information might impact the financial professional's analysis or assumptions. In this day of electronic filing and instant communication, it is easy to automatically forward all case filings and notices to your financial professionals via e-mail. This allows your financial professional to review all case proceedings and determine what information is necessary to evaluate in connection with their engagement.

2. Know your financial advisor's role and limits. It is important from the outset of the case to establish specific expectations and roles for the financial advisors. This will help avoid surprises during the case. Although a financial professional's role may change based on the development of events during the case, it is important to identify what fundamental role the financial professional is hired to perform during the case. This also allows the parties to discuss and evaluate whether the financial

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## Tips for Financial Professionals

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professional is qualified to perform the job they are being hired to do prior to the start of the case. No attorney likes to hear during a deposition, or even worse, at trial, that their financial professional is not qualified to provide the analysis they were hired to perform. It is also important to discuss and explain the role and legal differences of a testifying expert versus a consulting expert as well as privilege issues when the financial professional is employed.

3. Explain legal theories to your financial advisor. Do not always expect your financial advisor to fully understand the legal theories involved in the case or relevant to the analysis the financial advisor is providing. Even if your financial advisor is well versed on the legal theories involved, since all cases involve unique facts and circumstances, it helps all the professionals to discuss the legal theories of the case and how the facts impact the legal positions taken by the parties and the financial analysis relevant to such theories.

4. Discuss and evaluate case strategy with your financial professional. Discuss and analyze your legal strategy with your financial professional. Financial professionals often provide valuable insight into strategy decisions related to the case. Financial professionals often provide strategy suggestions and comments related to practical business and financial issues that the attorneys may have overlooked in their focus on legal and procedural issues.

5. Communication is the key. Communicate early and often with your financial professional. Communication is especially important prior to depositions, trials/hearings, or meetings where the financial professional will be called upon to explain or defend their analysis. It is important to spend time in advance discussing and evaluating all potential areas of inquiry or concerns related to the financial analysis and the financial professional's presentation of their analysis.

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**Editor's Note:** *This is the first of a new series from the Bankruptcy Section Young Lawyers Committee.*

## In the Zone: The Mims v. Fail Decision

(Continued from page 1)

business trust. The laws of Delaware govern the duties owed by McCleer, as a managing trustee of the VBT. Based on a thorough reading of the case law, the Bankruptcy Court held that a cause of action based on a company's directors' and officers' fiduciary duty to creditors when the company is in the "vicinity" or "zone" of insolvency was recognized in both states.

### A. "Zone of Insolvency" Claims Under Texas Law

In *Mims v. Fail*, 2007 WL 2872283 (Bankr. N.D. Tex. Sept. 24, 2007), the Trustee sought to assert claims on behalf of the corporation as well as the creditors of VarTec Telecom, while the corporation was either insolvent or in the "vicinity of insolvency." Movants relied heavily on the decision in *Floyd v. Hefner*, 2006 WL 2844245 (S.D. Tex. Sept. 29, 2006), and argued that, in Texas, officers and directors do not have a fiduciary duty in favor of a corporation's creditors when the corporation enters the vicinity of insolvency. The Bankruptcy Court, however, did not find that decision controlling because: (1) the unpublished decision was not binding precedent; and (2) the decision lacked continuing validity.

*Floyd v. Hefner* relied heavily on *Conway v. Bonner*, 100 F.2d 786 (5th Cir. 1939), which the Bankruptcy Court found distinguishable since it dealt significantly with the issue of when a corporation is insolvent thereby giving rise to a fiduciary duty. In that case, "much testimony was introduced to prove insolvency at the time of the transfer, on the theory that the corporation was insolvent if its total assets were less than its debts," but insolvency in fact did not require the directors to act as fiduciaries for the corporation's creditors. *Id* at 787. Subsequent to the 1939 panel decision in *Conway v. Bonner*, the Texas Legislature changed the permissible definition of insolvency to include a company's projection of near term insolvency, which somewhat undermines *Conway's* continuing validity. Additionally, the end of the *Conway* decision noted that "[t]he appellee predicated his suit entirely upon the trust fund doctrine, and relied for recovery solely upon the right of the creditors. If he had sought to recover in the right of the corporation, and the appellee had consented or had not objected to federal jurisdiction, there would have been a different case." *Conway*, 100 F.2d at 786.

The Bankruptcy Court was more inclined to follow recent Fifth Circuit precedent which recognizes that a corporation's creditors are able to bring a cause of action against the corporation's officers and directors when the corporation enters the zone of insolvency. *See Carrieri v. Jobs.com, Inc.*, 393 F.3d 508, 534 n.24 (5th Cir. 2004). The Bankruptcy Court recognized that the statement in *Carrieri* was dicta; however, the reasoning was highly persuasive in light of other case law, particularly case law in Delaware.

### B. "Zone of Insolvency" Claims Under Delaware Law

As stated recently by Judge Leif Clark, "Courts across the nation have looked to Delaware for further developments and clarification regarding this cause of action." *I.G. Services v. Wells Fargo Bank*, 2007 WL 2229650 *2 (Bankr. W.D. Tex. July 31, 2007). A seminal case from Delaware for the proposition that the duties of officers and directors expand to include creditors and that creditors may bring derivative claims against a corporation's

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