



THE ANNUAL  
MEETING  
THAT WASN'T  
AND WHERE WE  
GO FROM HERE

LENDING A  
HELPING HAND?

*The Impact of Assistance  
During Covid-19*

DOING THE SPLITS:

*Plain Language  
and Section 502(d)*

DIALING FOR DOLLARS:  
*Your Incredible Generosity*

# COLLEGE COLUMNS

A MAGAZINE FOR AMERICAN COLLEGE OF BANKRUPTCY FELLOWS | MAY 2020

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## From the Chair

### The Annual Meeting That Wasn't, and Where We Go From Here

Mark D. Bloom, *Baker & McKenzie*  
*Chair, American College of Bankruptcy*



Ever since the Nominating Committee honored me with the opportunity to serve a two-year term as Chair of the College, I've looked eagerly forward to writing my first Chair's Column for this edition of College Columns. In normal times the Spring Column recounts with great pride and enthusiasm the events of the Annual Meeting, congratulates the newly-inducted Class of Fellows, extols the virtues of the Distinguished Service Award recipient, commends the outstanding educational sessions and, of course, expresses gratitude for the many Fellows and staff who made the Annual Meeting events so successful.

This year, however, each of us is confronted with personal and professional challenges of a type never encountered in our lifetimes. Placing Health and Family First, clients and firms right behind, we contend with a dangerous -- even life-altering -- global pandemic of a magnitude that leaves us only to wonder how, and for how long, it will continue to affect our families, careers and livelihoods. And so with the fondest hope that this Column finds each and every one of you safely sheltered, in good health and meeting your family and work responsibilities from home as best you can, I offer these thoughts and observations.

The 2020 Annual Meeting. It was only with the most profound regret that after careful, real-time consideration of the fast-developing circumstances relating to the oncoming COVID-19 onslaught, the Executive Committee voted to cancel the Annual Meeting that was scheduled for March 12-14 in Washington. Looking back over the weeks that have passed -- ever so slowly, it seems -- since that decision, it's almost difficult to remember the time when we actually and agonizingly considered whether to go forward. Indeed, it was not until the Sunday prior, March 8, that the Executive Committee met by telephone and reached the regrettable but inevitable decision that we had no choice but to cancel.

It was at that point that our Fellows, and particularly our

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# From the Colum...nist..... Virtually at Work

Steven N. Berger, Engelman Berger, P.C.  
Co-Editor, College Columns



*HOW* are we supposed to keep our feet on the ground when our work life is literally “in the cloud?” Many lawyers, especially the younger ones, have long touted the idea of working from home or other remote locations. I’ve stubbornly clung to my compartmentalized vision of life and law practice – work at work, and be home at home. Leaving work at work was always something my significant other appreciated. Today, of course, home is home and work is at home. Every day. I’m working in my home office without colleagues, staff, and the comforts of our barely one-year old new office space in the heart of mid-town Phoenix. No dogs or kids, but the land line rings with phone solicitations (as does my cell phone these days), the yard crews do their work and I am left to wonder - Is this the new normal our younger colleagues have hoped for? Is it growing on me? Hmm.

I must confess that I know myself well enough to have predicted what I miss about working in an office environment. Collegiality. Collaboration. Eye contact. Two people talking at the same time (a non-zoom thing). The feeling of working together to accomplish something. The ability to monitor the business of our firm, from staff productivity to providing positive reinforcement and recognition to others. Singing in the hallways. Encountering a colleague in the break room getting coffee and catching up in an unplanned, non “here’s-the-link” way.

*Yet, the work must get done.* The work is as compelling as I can remember. Family businesses on the line. Unpaid creditors. Unpaid landlords. Clients new and longstanding looking for reassurance in an instantly changing legal and business environment. And the pervasive enemy of most of their calmness and comfort

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## President's Message

Melissa S. Kibler, Mackinac Partners  
President, American College of Bankruptcy



Greetings from my home office in Chicago. I hope that each of our College Fellows is reading this column in safety and good health. These are times when we all must count our blessings, both personally and professionally. It seems only fitting, therefore, to start by expressing my gratitude for the opportunity to serve as President of the College, and for the tremendous dedication of so many prior Chairs, Presidents and leaders at the national and circuit levels who have guided and enriched this organization. Additionally, while many non-profits are currently facing an uncertain future, we also can be thankful that the College and Foundation are in good financial health. Having most recently served as Treasurer of the College, I will provide some additional insight into two important aspects of our financial stability—the Patrons & Sponsors program and our newly implemented reserve and investment policies.

First, our 2020 Patrons & Sponsors program saw its most successful year ever under the leadership of now-Chairman Mark Bloom and an ad hoc committee of Fellows who dedicated countless hours reaching out to Fellows to encourage participation. The Patrons & Sponsors program provides over 50% of the College's core receipts, with dues comprising most of the remainder. To date, our Patrons and Sponsors contributions for 2020 total \$356,250, far exceeding the \$294,000 received in 2019. A total of 137 firms contributed, including 32 Sustaining Patrons (\$5,000), 44 Patrons (\$2,500), 54

Sponsors (\$1,500), and 7 Supporters (\$750), a new level added in 2019 for Fellows in small firms. A key to the success of the program this year was the renewal of virtually all of our 2019 contributors, combined with the addition of 33 new firms – a record! We are working on new ways to recognize the firms and thank the Fellows who provide this critical support, and to make participation in the Patrons & Sponsors program easier than ever.

Second, last year the boards of the College and Foundation approved and implemented reserve and investment policies. These policies were the culmination of work started by a joint College/Foundation Ad Hoc Endowment Task Force in 2017, with the Finance Committee picking up the mantle in 2018. These efforts led to the establishment of board-designated reserves in 2019, with the goal of ensuring long-term organizational and fiscal stability that will enable the College and Foundation to respond to varying economic conditions and to continuously carry out their missions. Reserves include the following: (i) operating reserves intended for use in unusual circumstances or for unforeseen financial needs; (ii) special purpose operating reserves intended to fund budgeted grants to be made by the Foundation; and (iii) quasi-endowment funds intended to produce return on investment, rather than to fund current operations or grants. While none of us could have foreseen the current circumstances, it is exactly for such purposes that good governance dictates that organizations like ours implement appropriate reserve policies.

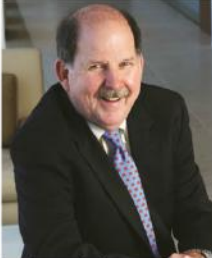
The boards also authorized the retention as

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## Class 32 Nominations

Charles A. Beckham, Jr., Haynes and Boone, LLP  
Chair, Board of Regents



I hope all of you and your families are doing well and are safe.

Having endured what we hope is the worst of the coronavirus situation, we are now ready to embark on something more enjoyable – the nomination process for the 32nd Class of Fellows.

While we missed seeing the Induction of Class 31 in Washington, D.C. in March 2020, we can look forward to seeing their Induction along with Class 32 in Washington, D.C. in March 2021. In the meantime, Stephen Lerner our distinguished immediate past Chair of the Board of Regents, offered a few perspectives about the members of Class 31. Since we were not able to hear Stephen Lerner describe Class 31 at the 2020 Induction ceremony in March, here are a few remarkable attributes of the members of Class 31. The members include:

- conferees of the National Bankruptcy Conference;
- former President of the American Bankruptcy Institute;
- a member who argued and won unanimously in the US Supreme Court;
- a member who performed *pro bono* work for retired NFL players;
- two past Presidents of the National Association of Chapter 13 Trustees;
- a member who served as a Chapter 7 Trustee in more than 14,000 cases;
- volunteers for legal aid society;
- longest serving President of the National Conference of Bankruptcy Clerks; and
- many, many more accomplishments.

The members of Class 31 are accomplished scholars who have spoken in virtually every major city in our country in which the coronavirus has appeared. They support charitable endeavors benefitting veterans, the homeless, the disabled, and minority groups. They come from numerous states and Canada, the United Arab Emirates, Puerto Rico, Israel and the United Kingdom. They are described as highly ethical, consummate professionals, unselfish dedicated servants, paragons of civility, and are tremendously well liked. We can all admire the outstanding attributes of the members of Class 31 and applaud their accomplishments.

As we engage in the nomination process for Class 32, I ask that you thoughtfully consider how you will contribute meaningfully to our efforts to make the College even more reflective and representative of the diverse dimensions within our professional circles, including with reference to race, ethnicity, gender, sexual orientation, physical ability, type of practice and geography.

The Board of Regents will be meeting October 14, 2020 during NCBJ in San Diego, CA to nominate the 32nd Class of Fellows, who will be inducted next March in Washington, D.C. We admit only the most worthy candidates – truly the best and brightest insolvency professionals and academics. I hope that many of you have already undertaken the process of working on a nominating package, the deadline for completion of which is June 19th. Completing the nominations materials takes a lot of work and the process is strictly confidential-- candidates must not know that they are being considered.

As is our custom, before you begin work on

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## From the Foundation Chair Dialing for Dollars: Your Incredible Generosity

*Paul E. Harner, Ballard Spahr LLP*

*Chair, American College of Bankruptcy Foundation*



First, and by far most important, I hope all of you and your loved ones are safe and healthy in this rapidly changing and uncertain environment.

Second, and I suppose to assume the role of Captain Obvious, this environment has placed even greater strain on the indigent, including the newly unemployed, many of whom may have no choice other than to avail themselves of our consumer bankruptcy system.

That makes it even more important that we remain vigilant about the good work of the Foundation and, in particular, its Pro Bono Committee. The grants made annually by that Committee, based on extremely hard, months-long review of applications, are directed exclusively to local *pro bono* legal services organizations providing bankruptcy-related services to the underprivileged.

As you know, that work is entirely dependent on the generosity of Fellows in our annual fundraising campaign; and I am relieved (at least for the moment) that, although no one saw this pandemic coming, you were particularly generous last year.

The 2019 Foundation fundraising campaign produced exciting results in a number of significant respects, including, most importantly, its ultimate grand total. Total giving for 2019 was **\$345,964** – representing the fourth consecutive year that the campaign broke the magic \$300,000 barrier, and surpassing our 2018 result by **\$17,475** (an improvement of **5.3%**). The 2019 result also was another all-time Foundation record.

Importantly, we also exceeded our concededly lofty goal for the 2019 campaign. At our October 2019 all-Fellows luncheon, we announced a College-wide campaign goal of **\$330,000** (or \$15,000 more than the announced 2018 goal). We thus achieved a final result that exceeded our announced aspirations by approximately **4.8%**.

THANK YOU to all of our generous Fellows who made these wonderful 2019 results possible. And thanks in particular to our Foundation directors and other fundraisers, who spent essentially the entire Holiday season successfully “Dialing for Dollars.” Incidentally, part of what makes their (and your)



achievement in 2019 particularly impressive is that the calendar was about as challenging as imaginable: Thanksgiving fell on the latest day in the year possible, and both of the year-end holidays fell on Wednesdays, meaning that many of our Fellows simply became unavailable for the last two weeks of the year. BRAVO!

Now for 2020. In his column, our Chair Mark Bloom reports the wonderful news that cancellation of the Spring meeting did not result in any material financial loss to the College. Kudos to Shari Bedker and her wonderful staff for achieving a result we frankly did not expect.

As Mark also reported, large number of Fellows registered for the Spring meeting

generously donated their registration fees to the College. This will, of course, result in a direct, gross financial contribution to the Foundation.

As a result, our 2020 fundraising is off to a surprisingly strong start. But this will be the Foundation's most challenging year in memory, on both the fundraising and grant-making sides of the house. There also will be many, if not an overwhelming number of, demands for your charitable dollars from other worthy causes. So please keep the Foundation in your year-end plans. We will again be Dialing for Dollars – and you will be a diallee!

Stay safe and healthy. 🙏

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## Pro Bono Update

*Hon. Janet E. Bostwick, U.S. Bankruptcy Court  
Co-Chair, Pro Bono Committee*



The current times have brought many personal and professional changes for each of us. With businesses closed across the country, staggering unemployment numbers, and uncertainty on the return to normal, like many of you, I expect that the future will see increased work in the bankruptcy field. But, as the Pro Bono Committee begins our 2020 grant cycle, I am also mindful of the challenges and demands our grantees will face. For our grantees who deal with individuals and families particularly vulnerable to an economic downturn, the continued support of the Fellows, the Foundation, and the College will be of critical importance this year.

With spring's arrival, the Pro Bono Committee begins its work for the Foundation. Through the grants

recommended by the Committee, the Foundation fulfills its mission to support organizations that provide bankruptcy-related legal representation, training or education for low income individuals and families. Grant applications are posted on the Foundation's website and are due June 1, 2020. Shortly after the due date, Committee members will begin the careful review of the applications. As always, our goal is to support programs that maximize the use of funds to expand pro bono services and support for low income self-represented debtors. Grantees run programs that take many different forms such as pro bono clinics, help desks in bankruptcy courts to assist self-represented debtors, community education programs on debt and bankruptcy, and trainings to expand pro bono volunteers. This fall, after extensive review, the Committee will propose an allocation of budgeted grant funds to the

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## Lending a Helping Hand?

Susan Block-Lieb, Cooper Family Professor in Urban Legal Issues, Fordham Law School  
Scholar in Residence, American College of Bankruptcy



Since at least the beginning of March, fellows of the American College of Bankruptcy have struggled to confront a new reality – the presence of the coronavirus pandemic and its effects on global health and the global economy.

Like many, I suppose, I was only vaguely aware of the extent to which COVID-19 could impact my life and the lives of hundreds of millions of U.S. residents – vaguely aware, that is, until I received an email jointly sent by Mark Bloom and Marc Levinson on March 8, the weekend before the scheduled Spring ACB meeting, cancelling the meetings we had spent months in planning because of what then was referred to as the coronavirus epidemic. Within days, my academic institution followed the ACB. Beginning March 11, Fordham University, like many universities, ceased teaching face to face for an indefinite period of time; at the law school, we commenced teaching law students “remotely” through something called Zoom, an Internet application I had never heard of until those early months in March. Zoom is now the portal through which many of us now observe the world – I have taught Zoom classes, participated in Zoom faculty meetings, attended and presented at Zoom conferences. As an extended family, we held a Zoom Passover Seder. As a member of an extended community of grieving friends, I cried at a Zoom Shiva.

Epidemiology classically defines a pandemic as “an epidemic occurring worldwide, or over a very wide area, crossing

international boundaries and usually affecting a large number of people.”<sup>1</sup> The World Health Organization omits from this definition seasonal and regional epidemics and more narrowly applies the term only “when almost simultaneous transmission takes place worldwide.”<sup>2</sup> A pandemic is both global and long lasting.

The scale of a pandemic may not feel difficult to comprehend conceptually, but the numbers – the exponential growth and multiplier effects – of those affected by COVID-19 are mind boggling. Today’s New York Times reports in excess of 3.2 million cases and 233,657 deaths from the coronavirus, globally, with more than 1 million of these cases and 63,109 of these deaths in the United States. The overwhelming bulk of these million cases are concentrated in 10 states: New York has borne the brunt of the virus, with 309,696 reported cases to date, but the other nine states with the highest rate of infections – New Jersey, Massachusetts, Illinois, California, Pennsylvania, Michigan, Florida, Texas and Louisiana – together account for another 463,000 cases.<sup>3</sup>

The scale of the impact of the pandemic is also evident from the figures describing the similarly mind-numbing economic side-effects of the pandemic: over the past 6 weeks, about 30.3 million Americans have

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<sup>1</sup>J.M. Last, ed, A dictionary of epidemiology (4th ed., Oxford University Press, 2001).

<sup>2</sup>Heath Kelly, The classical definition of a pandemic is not elusive, 89 Bull. World Health Org. 469 (July 2011), available at <http://www9.who.int/bulletin/volumes/89/7/11-088815/en/>.

<sup>3</sup>New York Times, Coronavirus in the U.S.: Latest Map and Case Count (May 1, 2020).



# Doing the Splits: Circuit Splits Under the Bankruptcy Code

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

## *Plain Language and Section 502(d) - Assertion of Claims in the fictional case of Dr. Seuss v. Justice Holmes?*



***"A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and time in which it is used."***

*Towne v. Eisner*, 245 U.S. 418, 425 (1919) (Justice Oliver Wendell Holmes famously said that "it is not necessarily true that income means the same thing in the Constitution and the Act [at issue]").

***"[W]e begin with the understanding that Congress 'says in a statute what it means and means in a statute what it says . . .'"***  
*Hartford Underwriters Ins. Co. v. Union Planters Bank N.A.*, 530 U.S. 1, 5 (2000) (Justice Antonin Scalia's statement being reminiscent of the works of Dr. Seuss) (internal citations omitted). More modern-day Justices seem to disagree with the characterization of viewing statutory language as "the skin of a living thought" and side with plain language. In *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989), Justice Harry Blackmun stated: "[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."

When it comes to Section 502(d) of the Bankruptcy Code, what do the words "recoverable," "avoidable," "unless," and "liable" mean? Does this statute say "what it means" and does it "mean [] . . . what it says"? Or are the words "the skin of a living thought," requiring a much more contextual, and even a policy-driven, interpretation? The problem is that, when it comes to Section 502 (d), circuit courts have disagreed not only as to the plain meaning of these key words, but also as to the policy behind this mandatory disallowance directive.

Section 502(d) requires a bankruptcy court to:

[D]isallow any claim of any entity from which property is *recoverable* under section 542, 543, 550, or 553 . . .or that is a transferee of a transfer *avoidable* under section

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## Pre-Pandemic 9th Circuit Retreat!

David Shemano, Shemano Law



One of the most enjoyable benefits of membership in the College is the opportunity to socialize with colleagues and their spouses. Unfortunately, the COVID-19 crisis has required the cancellation of all social events, including the annual induction ceremony in March. Fortunately, the Ninth Circuit Fellows had scheduled a Circuit retreat for mid-February, which went forward in blissful ignorance.

The weekend of February 13-15, 2020, the attendees and spouses met at Mountain Shadows Resort in Scottsdale, Arizona. The retreat commenced on a Resort patio, where we enjoyed cocktails while taking in the beautiful sunset with a view of Camelback Mountain, followed by a delicious buffet dinner. Only in Scottsdale, with help from several heat lamps, could we eat dinner outdoors in February.

We then gathered Saturday morning for educational sessions. Cynthia Nelson started us off with a presentation entitled *How Regional Mall Owners Are Responding to Evolving Retailer and Consumer Needs*. While very thorough, Cynthia somehow failed to anticipate that a global pandemic would soon shut down all malls.


Following Cynthia's presentation, Susan Boswell, Rob Charles, Jim Stang, and Gregg Zive participated in a panel entitled *God and Non-Profits: Does Chapter 11 Work For Either of Them?* Very interesting to learn about the unique challenges presented by these non-traditional chapter 11 cases.

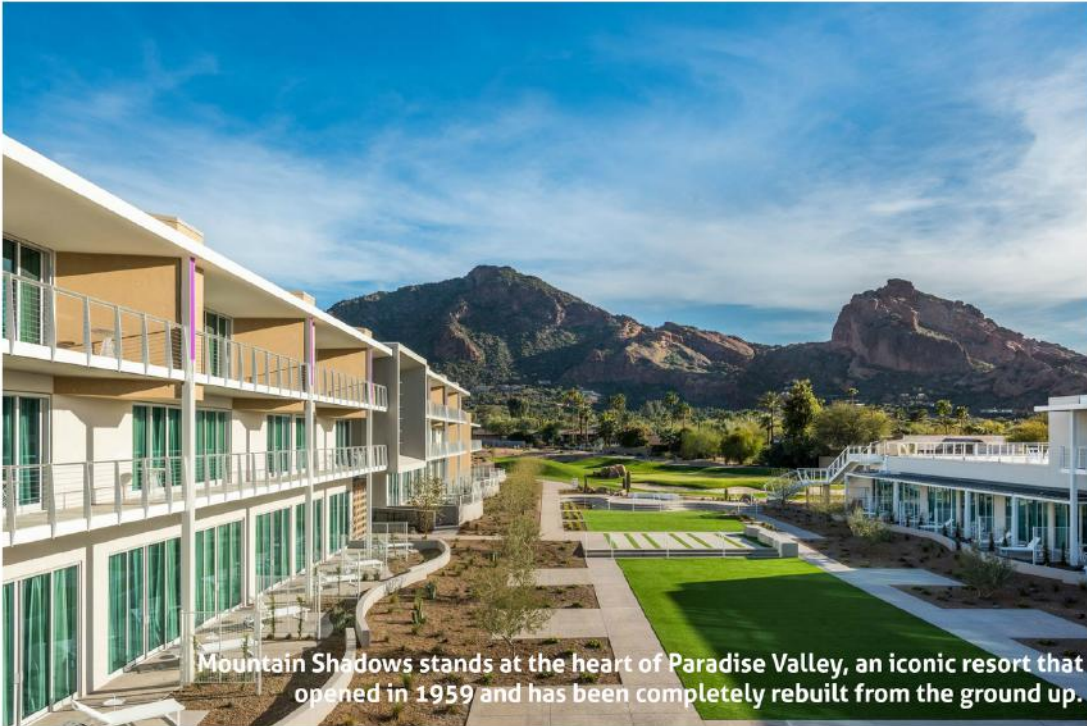
Next, Professor Gary Marchant of the Sandra Day O'Connor College of Law gave a presentation entitled *Hold On To Your Assets:*

*Emerging Technologies and The Future of Bankruptcy Practice*. Prof. Marchant talked about how developing technology is impacting the practice of law. Based on the trends identified, I hope that I will be able to practice another ten years before being replaced by artificial intelligence.

Finally, we were entertained over lunch by Randy Haines, who told us *The Untold Story of the Ultimate Creditor's Remedy*. We learned about the "Pitkin Affair," an early 18th Century bankruptcy fraud scheme that had more than enough unbelievable twists and turns to warrant its own binge-worthy television series.

After an afternoon break designed to permit Peter Benvenuti, Richard Holley and me to play the Resort golf course, we gathered for cocktails and dinner at the Musical Instrument Museum, a Phoenix institution that displays more than 7,000 musical instruments from all over the world. Our group was provided exclusive access to the Artist Gallery, which contained audio and video displays of performances by various artists. Thanks to the help of Steve Berger, we were entertained throughout the evening by the upbeat piano playing of Beth Lederman and her band *Jazz con Alma*, to which we danced the night away.

The success of the retreat was the result of the contributions of a great committee including Steve Berger, Rob Charles, Susan Freeman, Richard Holley, Eve Karasik, Randy Newsome, and Tom Patterson, and the sponsorships of Bush Kornfeld, Engelman Berger, Foley Lardner, FTI Consulting, Holley Driggs, Klee Tuchin, Lewis Roca and Pachulski Stang. Hopefully, we will be a position to have another retreat sooner rather than later. 



*From The Chair*  
*continued from page 2*

Executive Director Shari Bedker and her staff, sprang into action to mitigate, and virtually eliminate, the adverse financial impacts of the decision that circumstances forced upon us. Since Monday March 9 was the deadline to cancel reservations at the Grand Hyatt without penalty, Shari promptly transmitted the email blast we had prepared in advance but hoped never to send, announcing the cancellation to all of our Fellows who had registered. She then set about the more difficult part: approaching individually the hotel, Induction Ceremony venue, restaurants, and multiple vendors with whom we had contractual or other commitments

The positive response on all levels was nothing short of astounding. We are humbled and grateful to those many Fellows who, anticipating a financial loss to the College that could have run to almost \$200,000, stepped up voluntarily with the offer to donate their prepaid registration fees. We also are enormously grateful to the Grand Hyatt, Smithsonian, and all of our restaurants and other venue and tour partners who so willingly offered to refund our deposits, release us from our obligations, or roll those arrangements to 2021 or 2023 (recall here that our 2022 Annual Meeting will be in Denver). Through their graciousness and cooperation, as announced in a further email blast on April 2, we are able to issue a refund of the prepaid registration fee to every Fellow who did not decline it by on or before April 17.

What About All the Events? The financial disaster having been averted, we turn next to consideration of what to do about the events we were forced to cancel. With the cooperation of our Directors we were able to hold our Board meeting telephonically on March 13 as scheduled, and I thank all of our devoted Board members for their attendance and participation.

After careful consideration of the cost and logistics involved in moving some or all of the other events to our Fall Meeting in San Diego, we have decided as follows:

- The Class 31 Induction Ceremony will be combined with that of Class 32 at the Annual Meeting in Washington next Spring, at our favored venue of the Smithsonian National Portrait Gallery, within walking distance from our hotel and meeting site. Pending their official induction we will extend to the Class 31 Fellows all of the rights and privileges of membership, and were delighted to conduct a telephonic orientation meeting for them back on March 25.
- The presentation of our Distinguished Service Award to our longtime friend and College Counsel Bill Perlstein will be the featured event at the Fellows Luncheon in San Diego on October 14, 2021. We remain in frequent contact with the Hon. Laurel M. Isicoff, our Fellow who serves as President of the NCBJ, to confirm that at least for now their 94th Annual Conference remains on the calendar, and expect to follow suit with our related College meetings and events including the Luncheon. It remains unsettled whether Bill and his presenter, our illustrious former Chair and President Mike Cook, will agree to attend in tuxedo, but one way or the other we are proud to honor Bill by presenting the Award and turning the keynote presentation at the Luncheon over to the two of them.
- We have been working closely with our Scholar in Residence, Prof. Susan Block-Lieb, who in turn is working with all of our distinguished panelists, to reschedule and possibly reformat the Educational Programs into a series of podcasts, webinars or other remote



presentations, and post all of their excellent materials online. Shari and her team are confirming arrangements for accreditation of these online programs, and we hope to make an announcement to everyone shortly.

- We will be inviting all of our Distinguished Law Students to join us and be introduced at our Luncheon in San Diego, and Shari also has arranged for them to attend the IWIRC conference at no charge.

Looking Ahead. It goes without saying in these times of uncertainty that the broad financial support offered by the College and Foundation to legal services organizations providing pro bono consumer bankruptcy services will be in greater demand than ever. With unemployment having skyrocketed to levels not seen since the Great Depression and millions of new claims being filed every week, literally millions of American households will face the cruel dilemma of what bills to pay in order to provide food, shelter and basic amenities.

To help us meet these ever-increasing needs, we thank once again the 137 professional firms that supported the College's Patrons & Sponsors Program for 2020 to the tune of \$356,250, as well as the 546 Fellows who contributed an almost identical amount to our Foundation Campaign at the end of 2019. Both of these amounts are new records for the Program and Campaign, and details can be found in the separate Columns authored by our new President Melissa Kibler and our Foundation Chair Paul Harner, who begins his second term in that important role.

About My Predecessors. Sparing them here a rehash of the gentle roastings that I offered on our telephonic Board meeting and had hoped to embellish even colorfully for the Luncheon Meeting in Washington, I want to express my enormous and heartfelt gratitude to our outgoing Chair Marc Levinson, and to Chris Meyer whom Marc now succeeds in the role of Immediate Past Chair. Throughout my 22 years as a Fellow the College has been blessed year after year with Simply Great Leadership, a tradition that both of them have continued and enhanced. On behalf of the College I extend our warmest and most sincere thanks and appreciation for their service -- their thoughtfulness, dignity, and ability to lead by consensus and example have continued the path of the College to the thriving and vital organization it is today. Thank you Marc, thank you Chris, for being such magnificent leaders and role models. I know you both will be there for me as I seek your advice and wise counsel frequently over the next two years.

A Final Word. If you've read this far you hopefully haven't forgotten the Health and Family First note on which I began, and will end, this inaugural Chair's Column. The College continues to thrive and will be just fine, and I am honored by the opportunity to serve one final role in Leadership along with our new and continuing Officers, Directors, Regents and Committee Chairs. As always we seek and welcome your thoughts and suggestions, active participation on one of our many College Committees, and commend to you the many College and Foundation resources available on our website, [www.americancollegeofbankruptcy.com](http://www.americancollegeofbankruptcy.com).

Wishing you, your families, friends and colleagues safety, shelter and good health. As everyone in our profession gets increasingly busy dealing with the economic fallout arising from this global pandemic, I know that all of our Fellows will approach the avalanche of new challenges with the same passion for excellence and sense of professional responsibility that makes us so proud to have you in the College.

Until October, I hope. 🇺🇸

***President's Message***  
***continued from page 4***

discretionary investment manager of a specialized unit within Vanguard Institutional Advisory Services that focuses on non-profit organizations and foundations, with the objective of increasing investment returns with professional oversight and risk management. The College and Foundation formed an Investment Committee and adopted an investment policy to ensure that the investments are managed consistently with short-term and long-term organizational financial goals. In July 2019, the College and Foundation liquidated their remaining certificates of deposit and transitioned investment of approximately \$2.4 million in reserves to Vanguard funds. While these investments generated returns of approximately \$93,000 in 2019, the market disruption since that time has resulted in net losses of approximately 2.4% since inception. While this level of fluctuation is not inconsistent with the long-term investment horizon of the quasi-endowment funds, the Investment Committee is closely monitoring the situation and working with Vanguard to assess the implications of market developments.

I will close with thoughts on the current environment in the wake of the global pandemic. A group of former presidents of the American Bankruptcy Institute gathered by Zoom recently to celebrate the retirement of long-time executive director Sam Gerdano. We talked about the isolation – both personal and professional – that has resulted from COVID-19, and the hurdles that professional associations may face as we adapt to the new normal. The bankruptcy and restructuring profession, unlike any other I have seen in the legal and financial

worlds, is founded on a spirit of collaboration and collegiality among its professionals and participants. The College promotes that spirit through opportunities for Fellows to participate in educational forums; social events and ceremonies to honor the achievements of our peers; and the many committee activities focused on enhancing professionalism and efficacy of the bankruptcy system, preserving its heritage and helping the less fortunate. While the mechanisms for some of these activities may change in the short term, and perhaps even the long term, I know that spirit of collaboration and collegiality will be the foundation for the College not only to endure, but to be a source of strength for the profession and those we serve.

Bankruptcy and restructuring will be essential tools to meet the unprecedented economic challenges arising from this health crisis; the College and its Fellows will rise to meet those challenges. Further, the role of the College and the Foundation as the single largest financial supporter of pro bono consumer bankruptcy services in the United States will be ever more critical to those who are most in need of assistance during these difficult times. Thank you to our Fellows for answering the call, in so many ways, and I look forward to the opportunity to connect both in person and other ways in the time to come. ¶





***Class 32 Nominations***  
***continued from page 5***

a nomination, we ask that you reach out to the relevant Regent or Chair of the Judicial Nominating Committee or International Fellows Nominating Committee to preview your proposed nominee. After nomination packages are submitted to the Regent or Nominating Committee, the members of each Circuit Admissions Council and the two Nominating Committees undertake the important and arduous task of reviewing and vetting the nominations. They will be contacting many of you on a strictly confidential basis for your input about potential nominees. Each year, more than 100 College Fellows are involved in the nominations process. The list of Regents, members of the Circuit Admissions Councils and the Chairs and members of the two Nominating Committees can be accessed on the College website at: <https://www.americancollegeofbankruptcy.com/about/membership-information/>.

We welcome your active participation in the nominating process. Nominees must possess a number of qualities to meet the exacting standards of the College. These are discussed below and are set out in the bylaws of the College (found in the About section of the College website at the URL noted above).

The bylaws provide that the College honors those professionals whose sustained performance in the practice of their profession exemplify the highest standards of professionalism among bankruptcy specialists by granting them membership as Fellows. Fellows consist of bankruptcy professionals, including lawyers, judges, law professors, accountants, appraisers, auctioneers, officers of the government, officers of lending institutions, reorganization, workout and liquidation

specialists and others who are dedicated to the improvement of the bankruptcy process and the enhancement of the professional quality of and public respect for the insolvency and bankruptcy practice.

Membership is by invitation to honor those individuals who have proven to their peers, and to the bar, bench and public, through long, continuous performance in their bankruptcy specialty that they possess:

- the highest professional qualifications and ethical standards;
- that high level of character, integrity, professional expertise and leadership which demonstrates the likelihood that they will continue to contribute to the enhancement of bankruptcy scholarship, continuing education, and the bankruptcy process;
- a commitment to fostering and furthering the objectives of the College;
- sustained, exceptionally high quality professional services to clients, bar, bench, and public; and
- significant evidence of scholarship, teaching, lecturing, and/or distinguished published writings on bankruptcy practice, procedure, philosophy, improvements and reforms which demonstrates a consistent contribution to the enhancement of bankruptcy literature, education, practice and process.

Nomination applications will be reviewed and thoroughly vetted by the relevant Circuit Admissions Councils and Nominating Committees between June 19, 2020 and August 19, 2020. They will then vote to

***continued on page 16***

**Class 32 Nominations**  
**continued from page 15**

determine their recommended candidates after which additional due diligence will be conducted. The substantial vetting is an important check and balance to ensure that all relevant information on nominees is obtained and available to the Board of Regents. The Board of Regents will then meet on October 14th during the NCBJ to make final decisions on the admissions of new Fellows for the 32nd Class of the College.

On behalf of all the Regents, the Chairs of the Nominating Committees and the members of the Circuit Admissions Councils and Nominating Committees, I want to thank you in advance for your participation in this critically important process. It is among the most important functions of the College, and your participation will help ensure that the College continues to be the preeminent organization that it is. 🗨️



**Pro Bono Update**  
**continued from page 7**

Foundation and College Boards for approval. Through the generosity of the Fellows, the College and the Foundation, the Committee on behalf of the Foundation distributes significant funds to grantees across the country, in large and small cities as well as in rural areas for a variety of programs. But numbers alone cannot tell the true impact of your generosity. Let me share with you two client stories that demonstrate the life-changing personal impact of your generosity, as told by our grantee, Legal Access Alameda of Oakland, California.

*"Ella\* has had several challenges in her life. Years ago Ella was hooked on drugs and homeless, but she managed to get clean and go to nursing school. With her*

*degree she got a good position at a local hospital where she worked for many years. Ella loved her job and was making a decent living. She paid her bills on time and managed her money well, enough to take a vacation once and a while and donate to charity. Her life was happy and comfortable. This all changed two years ago when Ella began to lose her eyesight due to a hereditary disease. It started with vision loss in her left eye and progressed to where she could hardly see at all. As a result, Ella lost her nursing job and the bills began to pile up. Once she realized she couldn't pay off her debts, Ella decided to file for bankruptcy. Legal Access was able to help Ella navigate the bankruptcy process from start to finish, with special care and assistance, staff helping her complete tasks that might be easy for*





*someone with full vision, but seemed insurmountable for Ella on her own. After all was said and done, Ella discharged \$40,000 worth of debt. With support from disability services Ella can start over.*

*"Alice\* came to Legal Access looking for a fresh start. Alice worked for twenty years at a good sales job with a six-figure salary, but personal crisis and bad choices turned her life upside down. It began with her divorce, which caused a deep depression. Then Alice met someone new, but together the couple started experimenting with drugs, leading to a dangerous addiction that cost Alice her job and caused her life to implode. Alice lost everything and racked up \$100,000 in medical bills and credit card debt, going from successful career woman to homeless in short succession. After five years living on the streets, Alice reached out to her parents for help. In 2018 Alice checked into rehab, completed a six-month program and has been sober since. With the help of Legal Access, Alice filed for bankruptcy and received a discharge of all her debt. Now Alice feels ready to rebuild her life."*

Legal Access Alameda, Oakland, California, 2018 Grant Report (\*Names have been changed to protect clients' identities.)

Before I close, let me also share the good news that the Foundation Board has selected Norm Pernick to serve as Vice-Chair of the Pro Bono Committee. Norm is a long-standing member of the Committee, in addition to having served on the Foundation and College Boards. Particularly given the expected increase in demand for grants, Norm will be an invaluable resource for the Committee and the Foundation Board. Please join me in congratulating Norm.

My thanks to the Fellows, the College and

the Foundation, who support the work of the Committee. My thanks also to the members of the Committee for their considerable time and effort on behalf of the Committee. And finally, a personal thanks to Carole McNamara, who handles the administration of the Committee and communications with grantees and makes it all run seamlessly. ¶



**From the Colum...nist  
continued from page 3**

– uncertainty.

This is where we must shine with our professional skills. Identify the risks. Identify the choices. Guide the client through a reflective decision making process. Re-assure without providing false or trite hope or projection of our own fears. So much is and will remain uncertain. From this circumstance comes our greatest opportunity to provide guidance and counsel. Seize the moments and be there for your clients. They will be seeking our guidance through this storm for the foreseeable future. You are virtually at work! So whether you need to spruce up your home office to be more productive, invest in a bit more technology, or just dig in, remember this is at its fundamentals a “helping” profession. ¶

### ***Lending A Helping Hand?*** ***continued from page 8***

filed for unemployment benefits because of stay-at-home directions from state and federal officials; in March 2020 alone, \$3.89 billion was paid out in unemployment benefits in the U.S., up from \$2.75 billion in February. April unemployment benefit figures are likely to be just as high.

Governmental reaction to the pandemic has been unprecedented, whatever one thinks about its timing or specifics.<sup>4</sup> Congress passed narrow appropriation bills in early and mid-March,<sup>5</sup> followed by the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), signed into law on March 26, 2020 and extending more than \$3 trillion in aid.<sup>6</sup> This was followed on April 24 by the Paycheck Protection Program and Health Care Enhancement Act, which supplemented the monies appropriated under the PPP and EIDL programs established in the CARES Act, and appropriated new funds for public health relief, with an additional \$484 billion.<sup>7</sup>

Federal, state and municipal governments have lent a helping hand to address both the public health and economic effects of the pandemic. In some settings, economic

assistance to address the financial hardship that has occurred as a consequence of COVID-19 – this helping hand – has, indeed, mostly come in the form of a "loan."

Structuring this assistance as a loan and not an outright grant has been intentional. Presumably Congress and the President are hoping that no one views the aid in the CARES Act as a bailout, regardless of the scale and immediacy of the federal government's economic assistance.

Jerome Powers, Chair of the Federal Reserve Board, in his remarks early April on the breadth and depth of the Fed's market interventions, was careful to "stress" that these had been an exercise of the Fed's "lending powers, not spending powers."<sup>8</sup>

Much of Congress's economic assistance similarly has been structured either as a new loan or as help with a pending or existing loan obligation. As one example, the CARES Act creates a new type of loan for the United States Small Business Administration (the "SBA") to administer, which it calls its Paycheck Protection Program (PPP). While 100% of the principal amount of these PPP monies is potentially forgivable, until forgiven the SBA Paycheck Protection involves economic protection by means of a

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<sup>4</sup>For a critique of the CARES Act aid to individuals, see, e.g., Pamela Foohey, Dalié Jiménez and Christopher K. Odet, *Cares Act Gimmicks: How Not To Give People Money and How To Do It Instead*, THE NATIONAL LAW REVIEW (April 11, 2020), available at <https://www.natlawreview.com/article/cares-act-gimmicks-how-not-to-give-people-money-during-pandemic-and-what-to-do>.

<sup>5</sup>Corona Virus Preparedness and Response Supplemental Appropriations Act (March 6, 2020)("an \$8.3 billion bill spurring coronavirus vaccine research and development"); Families First Corona Virus Act (March 18, 2020)("an approximately \$104 billion package largely focused on paid sick leave and unemployment benefits for workers and families").

<sup>6</sup>*Summary of CARES Act*, THE NATIONAL LAW REVIEW (March 29, 2020), available at <https://www.natlawreview.com/article/summary-cares-act>.

<sup>7</sup>For summaries of the April bill, see *Senate Passes Paycheck Protection Program and Health Care Enhancement Act*, THE NATIONAL LAW REVIEW (April 22, 2020), available at <https://www.natlawreview.com/article/senate-passes-paycheck-protection-program-and-health-care-enhancement-act>; American Medical Association, *Summary of PPP&HCE Act: COVID 3.5* (April 24, 2020), available at <https://www.ama-assn.org/delivering-care/public-health/summary-paycheck-protection-program-and-health-care-enhancement-act>.

<sup>8</sup>Jerome H. Powell, *COVID-19 and the Economy*, Remarks by Chair of the Board of Governors of the Federal Reserve System (April 9, 2020), available at <https://www.federalreserve.gov/newsevents/speech/powell20200409a.htm>.



loan.<sup>9</sup> Moreover, the conditions under which PPP loans are forgiven are complicated – and have become more complicated as SBA regulations have been finalized.<sup>10</sup> As a result, some borrowers have delayed borrowing under the loan so far; others may be less cautious and end up “owing” their lenders although the money was initially sought in the belief that the debt would be forgiven.<sup>11</sup> As another example, the CARES Act empowers the SBA to extend a small (up to \$10,000) grant to certain small businesses,<sup>12</sup> but these grants are only available to those applying for an Economic Injury Disaster Loan from the SBA.

The CARES Act also provides economic relief to individuals.<sup>13</sup> Not all of this relief comes in the form of a loan: importantly, it expands access to unemployment benefits otherwise provided by state law. But some of this federal relief explicitly takes this form: the CARES Act enables individuals to borrow against their 401(k) and related plans without incurring the federal tax penalties that would otherwise apply – in

other words, it ensures that the possibility of an existing “expensive” loan is made less expensive today but still holds potentially problematic consequences on retirement.<sup>14</sup> Other aspects of individual economic relief are extended only to certain borrowers – namely, provisions in the CARES Act that entitle some individuals deferment on interest accruing on their student loans, and assurances of forbearance from foreclosure on their residential mortgages, only apply to those currently in debt in specified contexts. None of these protections provide debt forgiveness or even an extension of the term of the covered loans, however. And I am not alone in worrying about this construct.<sup>15</sup>

“Lending” a helping hand to the millions and millions of small businesses and individuals that have and will continue to suffer economically in the wake of the pandemic is not nothing. Those that receive these new loans, or that are entitled to compassionate treatment of existing loans, are, I’m certain, grateful for the helping hand.

*[continued on page 20](#)*

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<sup>9</sup>Summary of CARES Act, supra note 6. This loan will have been extended by a private financial institution; banks are “encouraged” to lend under PPP through promises under the CARES Act of a federal guarantee. Id.

<sup>10</sup>Small Business Administration, Interim Final Rule, Business Loan Program Temporary Changes; Paycheck Protection Program – Requirements – Promissory Notes, Authorizations, Affiliation, and Eligibility, 13 CFR Parts 120 and 121 (April 13, 2020), available at <https://www.sba.gov/sites/default/files/2020-04/Interim-Final-Rule-04%2024%2020.pdf>.

<sup>11</sup>Stacy Cowley, Emily Flitter and David Enrich, Some Small Businesses That Got Aid Fear the Rules Too Much to Spend It, New York Times (May 2, 2020), available at <https://www.nytimes.com/2020/05/02/business/economy/loans-coronavirus-small-business.html?referringSource=articleShare>.

<sup>12</sup>This grant is only available to “small businesses” already in line for an Economic Injury Disaster Loan (EIDL) from the SBA. Summary of CARES Act, supra note 6 (noting that EIDL “applicants can get up to \$10,000 to cover immediate payroll, mortgage, rent, and other specified expenses” and that this grant does not have to be repaid; noting further that any “business that receives an EIDL can apply for, or refinance its EIDL into, the forgivable loan product” – in other words, through the PPP).

<sup>13</sup>Id. (summarizing provisions in the CARES Act providing benefits to individuals who might “(i) be eligible for additional unemployment benefits or tax rebates, (ii) have access to distributions from certain defined contribution plans, such as 401(k) plans, 403(b) plans and profit sharing plans, without penalty, (iii) be eligible for 401(k) plan and 403(b) plan participant loan relief, or (iv) be entitled to student loan deferment or mortgage forbearance”).

<sup>14</sup>Id.

<sup>15</sup>See Pamela Foohey, Dalié Jiménez and Christopher K. Odinet, The Folly of Credit as Pandemic Relief, \_ UCLA L. Rev. \_\_, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3588355](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3588355); see also Foohey, Jiménez and Odinet, supra note 4.

## Lending A Helping Hand? continued from page 19

But structuring this economic assistance as a loan, whether subject to forgiveness or not, holds potentially dire consequences over time – consequences that have not been made clear to the American public but which, I'm sure, are all too clear to our College membership.

After the worst of the public health effects from the coronavirus pandemic have receded, every EIDL borrower and some recipients under the PPP, every obligor under a student loan with deferred interest obligations, every residential mortgagor and tenant whose foreclosure or eviction has been stayed by virtue of federal law, will have to figure out how, in the uncertain economic context of recovery from a pandemic, they will pay back all this debt.

The economic rebound we hope to occur later in 2020 may be sufficiently swift and strong to enable this borrowing to get repaid, at least in part. But because I'm a bankruptcy lawyer, I tend to focus on the worst-case scenario contained in this half-empty glass – the near certainty that many will default in the wake of our slow emergence from this pandemic. Fewer than all U.S. borrowers (whether large businesses, small businesses or individuals) will be able to make their lenders whole in a timely fashion. And absent additional deferment and forbearance, this worst-case scenario thinking leads me to the conclusion that bankruptcy filings will increase over time – substantially. For many, in other words, the federal government's "helping hand" will later feel more like a slap in the face.

As bankruptcy practitioners, bankruptcy judges and scholars focused on bankruptcy law, our College membership will confront the reality of the scale of devastation left in the wake of this pandemic. The scale of the economic effects of the pandemic has led some to describe future increases in bankruptcy filings as a possible tsunami.<sup>16</sup> Whether measured as an ebb tide or a tsunami, increasing bankruptcy filings are likely to have longstanding implications for all members of the College – buckle your seat belts, we're in for a wild ride in the next few economic quarters. ¶

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<sup>16</sup>Bob Lawless, *A Coming Consumer Tsunami, Wave or Ripple?*, CREDIT SLIPS (April 16, 2020), available at <https://www.creditslips.org/creditslips/LawlessAuthor.html>; see also Jay Lawrence Westbrook, *The Role of Chapter 11 Bankruptcy in Addressing the Consequences of COVID19*, CREDIT SLIPS (April 27, 2020), available at <https://www.creditslips.org/creditslips/2020/04/the-role-of-chapter-11-bankruptcy-in-addressing-the-consequences-of-covid19.html>.





***Doing the Splits***  
***continued from page 9***

522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) . . . *unless* such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is *liable* under section 522(i), 542, 543, 550, or 553 . . . .” (Emphasis added.)

The application of this statute can be harsh, requiring the disallowance of the entire claim of a claimant, even if that claim far exceeds the amount for which the claimant is “liable” to the bankruptcy estate. However, this mandatory disallowance is not necessarily permanent. Section 502(d)’s requirement to disallow claims within its purview is still subject to the provisions of Section 502(j), which provides that “[a] claim that has been allowed or disallowed may be reconsidered for cause.” Certainly, no matter which side of the circuit divide one falls on, if the amount for which the claimant is “liable” is paid to the bankruptcy estate, this should constitute “cause” for reconsideration of a disallowance under Section 502(d) pursuant to the provisions of Section 502(j).

This journey into the meaning of modern statutory parlance begins with the Fifth Circuit in the case of *In re Davis*, 889 F.2d 658 (5th Cir. 1989). In that case, the Internal Revenue Service (IRS) sought the payment of approximately \$6.5 million in unpaid taxes, penalties, and interest from the debtors. The debtors responded by commencing an adversary proceeding, wherein the bankruptcy court found only \$84,000 to be owed to the IRS. The IRS appealed this determination, but while the appeal was pending, the debtor’s plan was confirmed. The newly appointed plan trustee sought turnover of \$400,000 in refunds and interest from the IRS and asserted the IRS’s claim

should be disallowed under Section 502(d).

The district court determined in the trustee’s turnover action that a significant portion of the IRS’s claim should be disallowed under Section 502(d) because of the IRS’s failure to promptly pay over the debtors’ refunds. In reversing, the Fifth Circuit held that Section 502(d) requires disallowance only after a creditor “has been afforded a reasonable time in which to turn over amounts adjudicated to belong to the bankruptcy estate,” and this had not occurred in this case. *Id.* at 662. In so concluding, the Fifth Circuit required a final adjudication of liability against the creditor at issue and a “reasonable time” for that creditor to comply with that adjudication before Section 502(d) could be used to disallow the claim of such creditor.

Eleven years later, the Ninth Circuit’s decision in *El Paso v. America West Airlines, Inc.*<sup>1</sup> (*In re America West Airlines, Inc.*), 217 F.3d 1161 (9th Cir. 2000), created the circuit split on the issue of when and how the disallowance provisions of Section 502(d) come into play. Unlike the *Davis* case, *America West* involved a statutory tax lien which was avoidable under Section 545(2), but which had not been avoided. Rejecting the Fifth Circuit’s interpretation of Section 502(d) as requiring an adjudication of liability against a creditor prior to its use, the Ninth Circuit focused on the word “avoidable” as used in Section 502(d), which the Court found did not require a final adjudication, and distinguished it from the alternative basis for disallowance if property is “recoverable” under alternative enumerated sections of the Bankruptcy Code. The Ninth Circuit rejected the argument that the creditor must first be

***continued on page 22***

<sup>1</sup>Our author Annette Jarvis personally briefed and argued the *America West* case in front of the 9th Circuit that created this circuit split.

***Doing the Splits***  
***continued from page 21***

found to be liable to turn over the property to trigger the application of Section 502(d) and instead explained the end clause of Section 502(d) beginning with the word “unless” as follows:

The use of the word “unless” indicates that the phrase is not an additional requirement for disallowance, but an exception to the general rule that a claim based on an avoidable transfer must be disallowed. The exception to the general rule of disallowance exists because, if the transferee has already relinquished the avoidable transfer, there is no need to disallow the claim. *Id.* at 1166.

The Ninth Circuit also addressed the defensive use of Section 502(d), which necessarily disappeared under the reasoning of the Fifth Circuit in *Davis*. In approving such defensive use, the Ninth Circuit distinguished between “an avoidance action, which seeks affirmative relief from the transferee, and a claim objection,” which it compared to “offsetting counterclaims and other matters of defense.” *Id.* at 1167 (citing *Committee of Unsecured Creditors v. Commodity Credit Corp. (In re KF Dairies, Inc.)*, 143 B.R. 734, 735-37 (B.A.P. 9th Cir. 1992)). The Ninth Circuit agreed with the Ninth Circuit Bankruptcy Appellate Panel in *KF Dairies* that “there would be no purpose for Section 502(d), if it applied only when the transfer could be avoided in an independent avoidance action,” finding that “Section 502(d) may be used to disallow a claim even if the underlying avoidance action would be time barred.” *Id.* at 1167.

Subsequent circuit decisions on both sides of this split emphasize not only the differences in construing the language used in Section 502(d), but also the divergence of

the policy reasoning behind each line of interpretation.

The Eighth Circuit, in *In re Odom Antennas Inc.*, 340 F.3d 705, 708 (8th Cir. 2003), followed the Fifth Circuit in determining that Section 502(d) “should be used to disallow a claim after the entity is first adjudged liable . . . .” The Eighth Circuit stated that Section 502(d) “does not provide affirmative relief” in disallowing claims that cannot be the subject of an independent final avoidance or turnover order. Rather, the Eighth Circuit found that Section 502(d) is designed, as a policy matter, to ensure compliance with judicial orders.

In contrast, in *Grant, Konvalinka & Harrison, P.C. v. Still (In re McKenzie)*, 737 F.3d 1034 (6th Cir. 2013), the Sixth Circuit adopted the Ninth Circuit’s interpretation of Section 502(d). *McKenzie* involved the defensive use of Section 502(d) to defeat a motion for relief from the stay of a secured creditor holding an avoidable lien, even though the governing statute of limitations on the avoidance action had expired. The Sixth Circuit stated: “At bottom, nothing in the text of Section 502(d) prevents a trustee from using his avoidance powers defensively after the expiration of the statute of limitations set forth in Section 546(a)(1)(A).” *Id.* at 1042. The Sixth Circuit explained that a defensive use of Section 502(d) did not constitute a “procedural windfall” because such use was limited to “offsetting the claim asserted by the creditor” and “does not permit any additional recovery by the trustee.” *Id.* at 1041. Instead, the Sixth Circuit noted that its interpretation of Section 502(d) “furthers one of the central purposes of the Bankruptcy Code—to ensure equality of distribution among creditors of the debtor.” *Id.* at 1042. In focusing on Section 502(d) as a tool to further the policy of equality of distribution in a bankruptcy case, this line of reasoning leaves open the use of Section 502(d) in the context of claims objections, a



more cost-effective way to enforce this policy rather than limiting its use only after a fully adjudicated adversary proceeding.

Competing interpretations of the “plain language” of Section 502(d) backed up by rival policy considerations have led to confusion in the application of these two approaches. While not addressing the precise circuit split at issue between the Fifth and the Eighth Circuits on the one hand and the Ninth and Sixth Circuits on the other hand, the Third Circuit, in *In re KB Toys Inc.*, 736 F.3d 247, 252 (3d Cir. 2013), cited to both the policy considerations of “equality of distribution of estate assets” and “coercing compliance with judicial orders” to support its conclusion that claims subject to disallowance under Section 502(d) in the hands of the original claimant remain subject to disallowance in the hands of a subsequent claimant. The Third Circuit reasoned that “[b]ecause the statute focuses on claims—and not claimants—claims that are disallowable under Section 502(d) must be disallowed no matter who holds them.” *Id.* Interestingly, while the Third Circuit did not stake out its position on the meaning of “avoidable,” “recoverable,” or “liable” in Section 502(d) or on the preeminent policy behind the use of these words, it did note that this statutory section’s legislative history reflects it was “derived from” Section 57(g) of the Bankruptcy Act of 1898. Section 57(g) provided:

The claims of creditors who have received or acquired preferences, liens, conveyances, transfers, assignments, or encumbrances, *void or voidable* under this title, shall not be allowed unless such creditors shall surrender such preferences, liens, conveyances, transfers, assignments or encumbrances. (Emphasis added.)

The Third Circuit then stated that “the case law interpreting Section 57(g) is consistent

with our interpretation of Section 502(d).” *Id.* at 253. While focused on the issue of the claim remaining subject to disallowance in the hands of a subsequent holder, this reference to the continued applicability of prior case law under Section 57(g) perhaps previews the adoption by this Circuit of the reasoning of cases decided under Section 57(g) of the Bankruptcy Act that appear to support the defensive use of Section 502(d) even when an affirmative avoidance action is time barred.

In sum, if Congress said what it meant and meant what it said in Section 502(d), circuit courts are still trying to figure out exactly what was either said or meant. Even peeling back the words as skin to expose the underlying policy objective and context of the statute hasn’t led to any consensus to date. *J. Homes v. D. Seuss* remains a draw! 🏆



## 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 Carole McNamara, ACB Communications Director, at [focus@amercol.org](mailto:focus@amercol.org).

**Josiah Daniel** (retired Partner in Residence of Vinson & Elkins LLP 's Dallas office) has just published *'Even If a Party Has a Change of Heart': A Proposed Framework for Enforcement of Courthouse-Steps Settlements in Cases and Proceedings in the Texas Bankruptcy Courts*, 52 Tex. Tech L. Rev. 199 (2020). He is also a Visiting Scholar of the History Department of The University of Texas at Austin and is writing the biography of Congressman Hatton W. Sumners, who chaired the House Judiciary Committee from 1932-1947.

The American Bankruptcy Institute selected **Chief Bankruptcy Judge Barbara J. Houser** (N.D. Tex.; Dallas) as president of the board of directors for a one-year term.

**Soneet R. Kapila** of KapilaMukamal, LLP (Fort Lauderdale, Fla.) has been named to a two-year term as American Bankruptcy Institute Treasurer.

In January and February 2020, the **Honorable Karen S. Jennemann** received the Florida Chief Justice's Distinguished Federal Judicial Award, the James G. Glazebrook Memorial Bar Service Award for Professionalism from the Orange County Bar Association, and the Woman of the Year in Restructuring Award from the International Women's Insolvency & Restructuring Confederation.

**Gary W. Marsh** has joined Troutman Sanders, LLP as a partner in the Finance and Restructuring practice.

The second edition of **Dr. Luis Manuel C. Méjan's** book, *Agenda Concursal*, has been released. The book is a compilation of all the regulations on Bankruptcy and Insolvency Law existing in Mexico, including Supreme Court and Constitutional tribunals decisions, since the colonial period until January 2020.

**Suzanne Uhland** has joined Latham & Watkins LLP's New York office as a partner in the Restructuring & Special Situations Practice within the Finance Department.

**Scott A. Wolfson** has been appointed to the American Arbitration Association's National Roster of Commercial Arbitrators. **I**



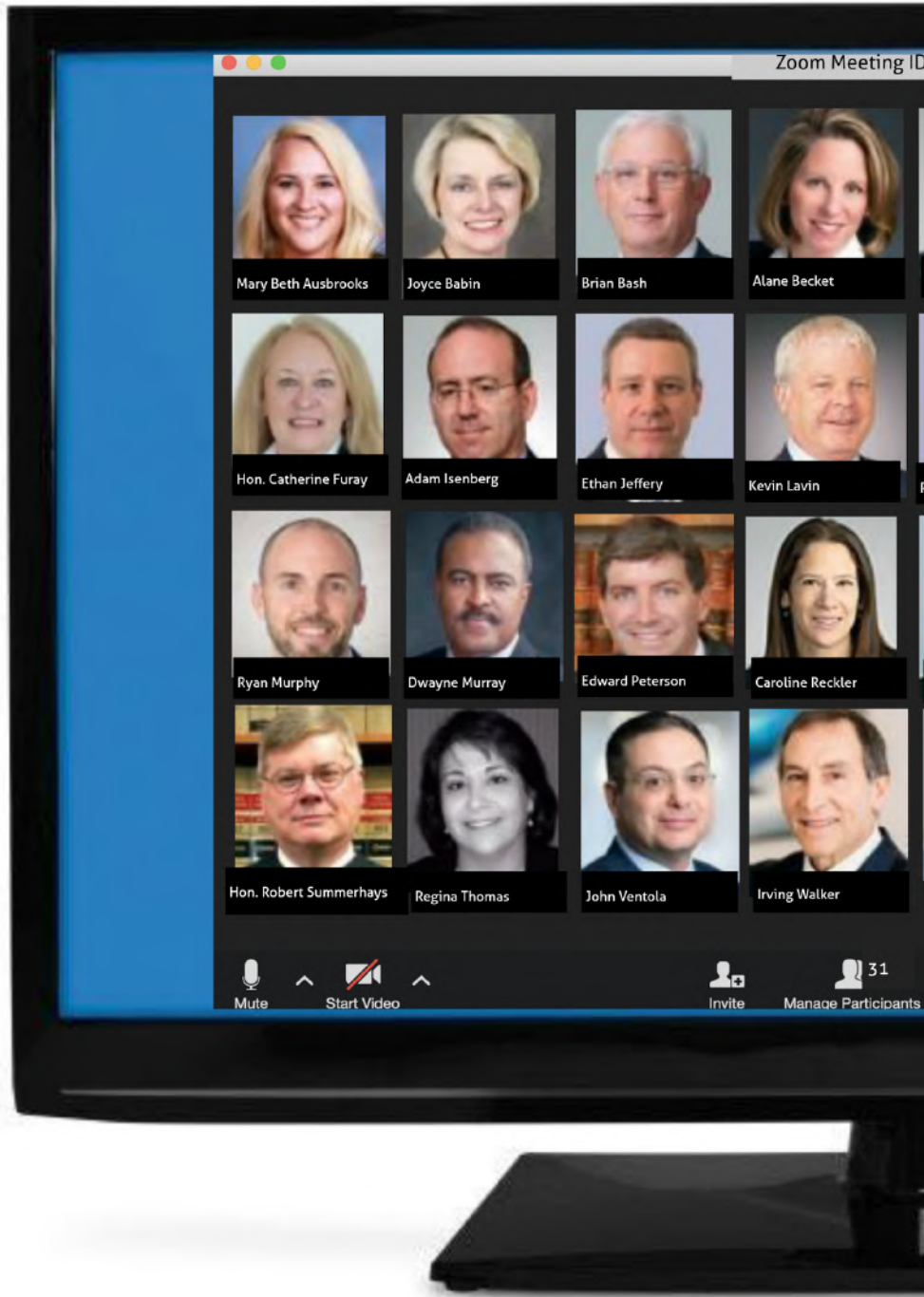


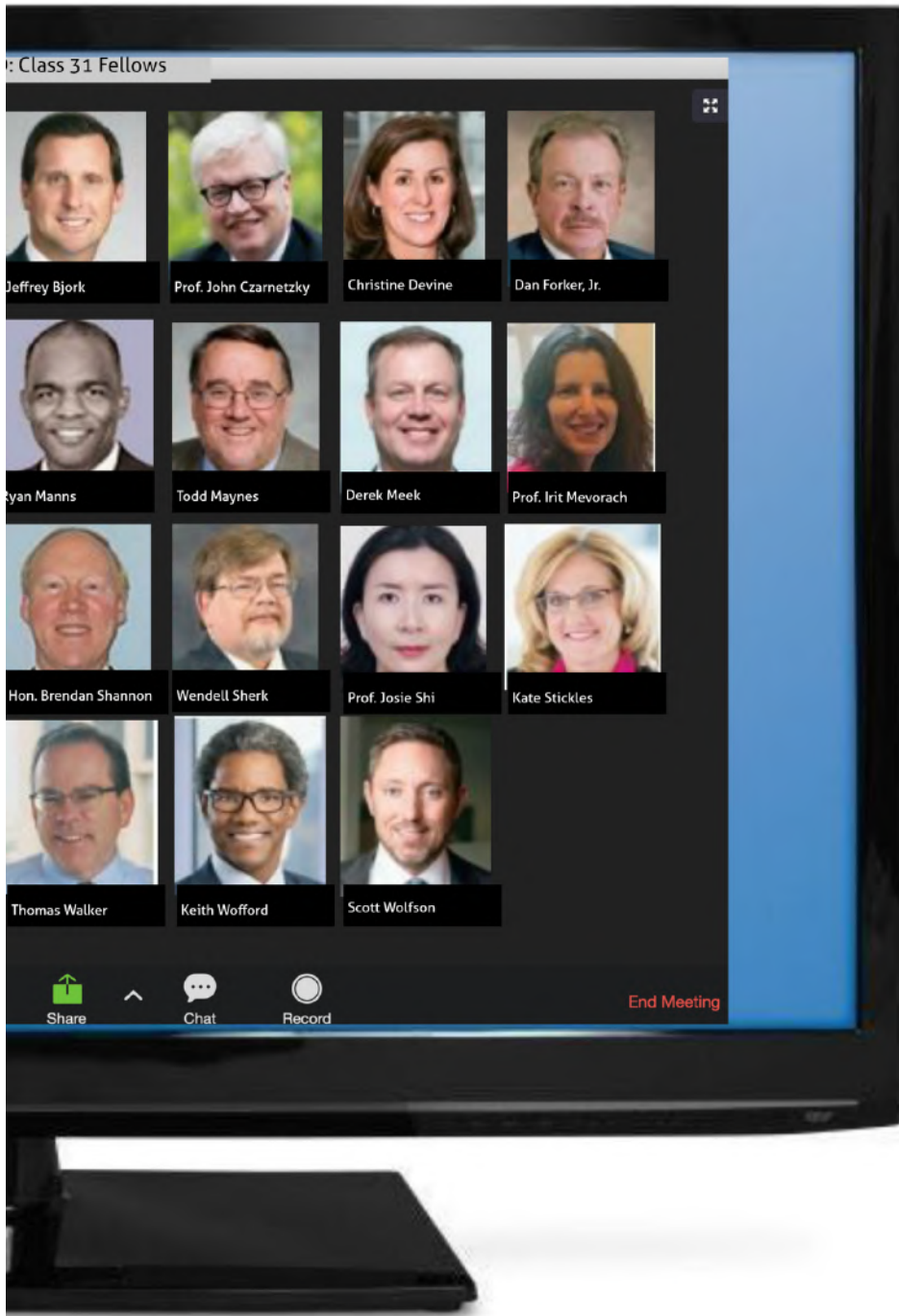


## Class 31 Fun Facts

ACB Fellows may not have been able to welcome Class 31 Inductees at an official, in-person ceremony in March, but that's no reason to miss getting to know our newest members. We thought you would enjoy reading about some of their interests and personal stories.

































- I love to cook, and I read cookbooks and recipes daily. - **Mary Beth Ausbrooks**
- I have, through "mergers and acquisitions," 11 children and 13 grandchildren (with an additional 2 on the way). Some of my grandchildren are older than my children. Harry Greenfield said the situation reminded him of a Ray Stevens song, "I'm my own grandpa." And as a nephew we cared for during high school years later told me upon returning from a couple of years stay at an ashram in India, " Brian, taking care of children is your karma." - **Brian Bash**
- My dream job is to be a safari guide in Kenya. - **Alane Becket**
- Growing up as a surfer kid in Southern California, I only applied to colleges located near prime surf spots. - **Jeff Bjork**
- Fun fact about me -- For the past 20 years, I have been a legal advisor to the Vatican's ambassador to the United Nations! - **John Czarnetzky**
- I judged the 27th Annual Worldwide Mustard Competition. Seventeen categories ranging from Deli/Brown to Exotic to Spirit and everything in between! Biggest surprise? Tequila Mustard! - **Hon. Catherine J. Furay**
- I did not go to kindergarten! - **Marie-Ann Greenberg**
- I am a big fan of Taiji + Qigong and Ice Hockey.....am I crazy or what? - **Kevin Lavin**
- When I was 23 years old, I was in Forbes Magazine's special edition identifying the 400 Richest People in America. At the time I was a law student and working part-time making \$5 per hour. - **Todd F. Maynes**
- I piloted a plane that I also jumped out of (while it was flying). - **Derek Meek**
- I used to be a cookery teacher but now I can't cook for my life. - **Prof. Irit Mevorach**
- I'm looking forward to running the rescheduled 2020 Boston Marathon in September and am on my way to finishing all of the 6 World Marathon Majors. - **Caroline Reckler**
- I'm a scuba diver who loves to travel. Some of my most beautiful and memorable dives include: swimming with giant manta rays in Yap and Palau, massive turtles in Moorea, sharks in the Blue Holes in Belize and the Bahamas, playful dolphins in Honduras, a friendly monk seal in Kauai, and abundant colorful sea life in Central America and the Caribbean. - **Kate Stickles**
- I train in the martial art of jiu jitsu and have a Blue Belt in both Gracie Jiu Jitsu (Brazilian style) and Ninpo (traditional style). - **Irving Walker**
- I am a competitive mountain bike racer. - **Scott Wolfson**





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As of May 1, 2020, 55 Fellows have donated over \$20,000 to the American College of Bankruptcy Foundation. The current list of contributors can be found below. As we always hope for 100% participation by our Fellows, please consider helping us to surpass our 2020 goal of \$330,000. You may make a Foundation donation at any time—simply visit [www.amercol.org](http://www.amercol.org) to access the online donation form. Thank you for your support!

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### In Memoriam

**Jo Ann J. Brighton**  
Class 19  
March 5, 2020

**Hon. Yoine J. Goldstein**  
Class 11  
March 21, 2020

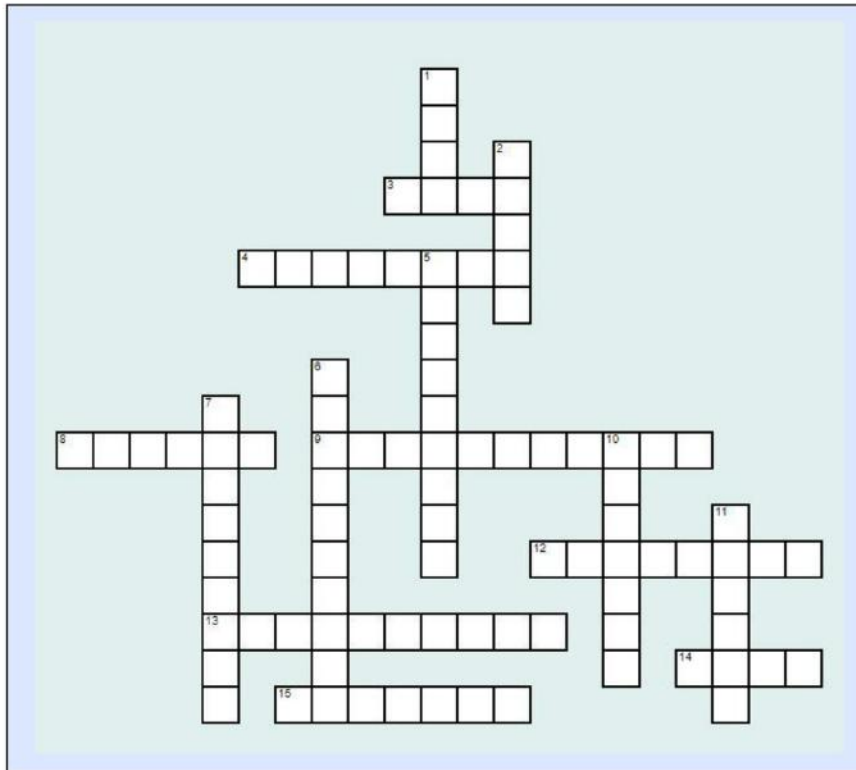
**Robert C. Goodrich, Jr.**  
Class 27  
March 7, 2020

**Frank J. Vecchione**  
Class 3  
April 24, 2020





## Columns XWords



### Across

3. Fed program with potential \$10K immediate grant
4. NCBJ site Fall 2020
8. College Induction city 2022
9. Hard to reorganize; hardest hit turn to takeouts
12. One P in PPP
13. FDIC loan program
14. Virtual meeting app
15. Projected big wave of filings

### Down

1. College Inductee Class #\_\_\_ this year (Roman)
2. College Mark (Chair)
5. IRS pandemic gift re filings
6. Hope of PPP "loan" recipients
7. Small business reorg filing increase in CARE Act
10. Center of Pandemic in USA
11. Hold exclusive right to file plan in small bus. cases

**Answers on back cover**



## 2020 Fall All-Fellows Luncheon

Join us for the American College of Bankruptcy Fall All-Fellows Luncheon to be held in sunny San Diego, California at the Marriott Marquis San Diego Marina Hotel on October 14, 2020, in conjunction with the 94th Annual National Conference of Bankruptcy Judges.

NCBJ has graciously offered to share its block of rooms with ACB Fellows who plan to attend the NCBJ conference. The \$299/night city view (or \$319/night harbor view) room rate expires on September 11th, or when the block is full, whichever is first. [Click here](#) for more details about accommodations.

Stay tuned for more information-- we'll be releasing luncheon registration details soon!

### Answer Key



### 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:

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Deborah Langehennig,  
[trustee@ch13austin.com](mailto:trustee@ch13austin.com)

We value your input. Thank you!

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