AMERICAN BANKRUPTCY INSTITUTE

Bankruptcy 2024:
Views from the Bench

Getting to Confirmation: Update on Developments

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Hon. Clifton R. Jessup, Jr.
U.S. Bankruptcy Court (N.D. Ala.) | Decatur

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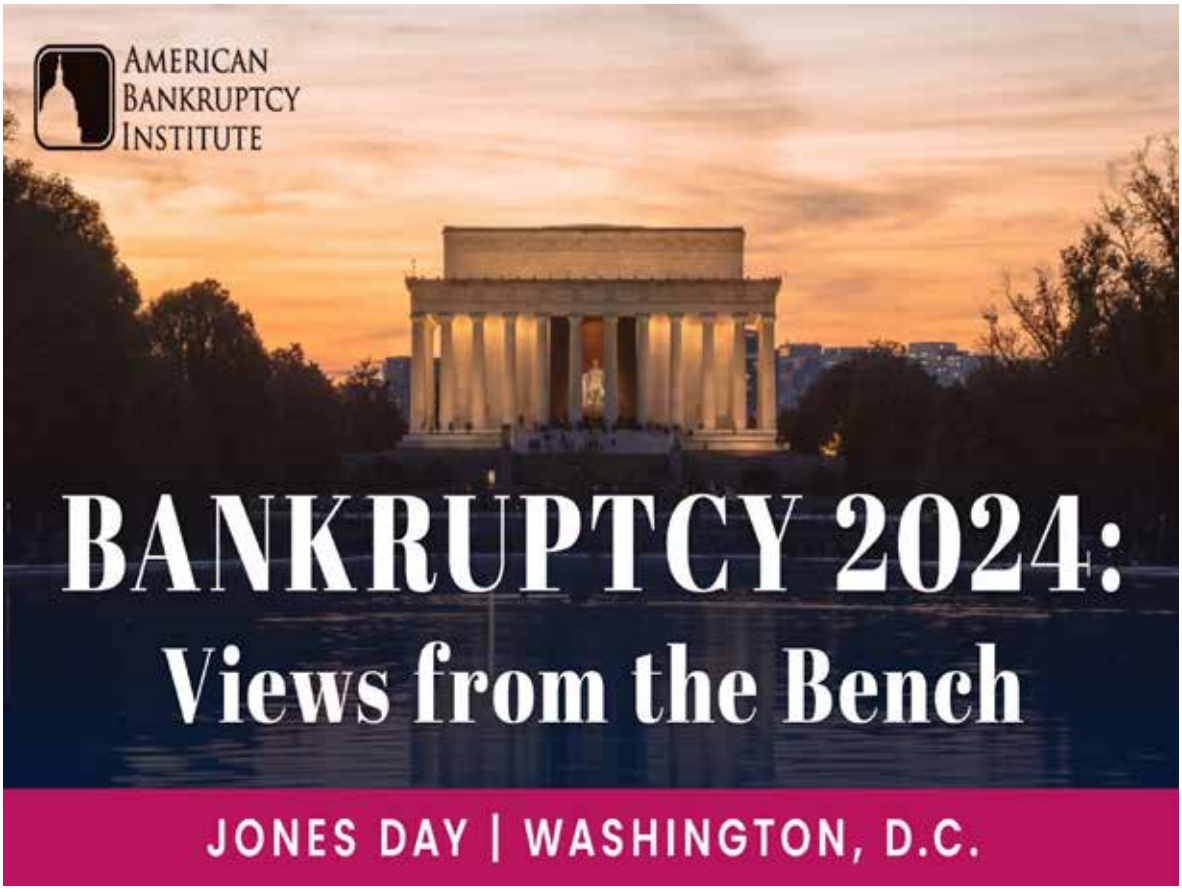
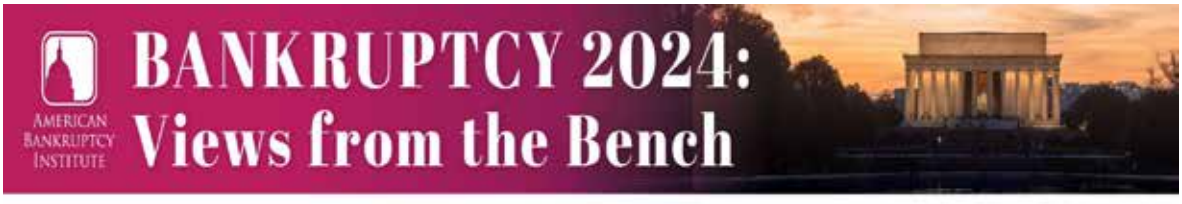
U.S. Bankruptcy Court (S.D. Tex.) | Houston

2024





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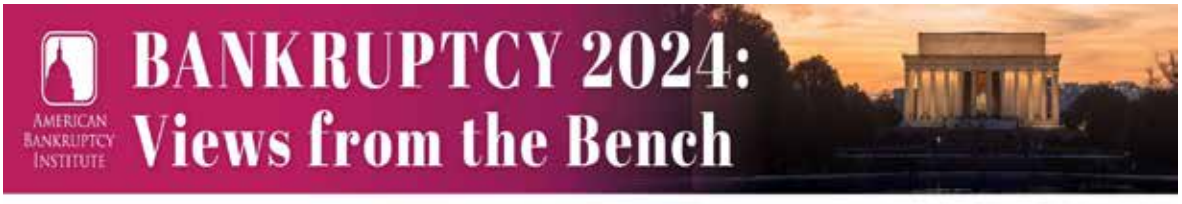
2 **Sub Rosa Plan Issues**

3 **Liability Management**

4 **Developments in Examiner Appointments**



1 Third Party Releases

Topic 1: Third Party Releases

Discussion Topics

- The *Purdue* decision on non-consensual releases
  - Its impact on mass tort and other bankruptcy cases
- What are consensual releases?
- Workarounds – gatekeeper provisions and chapter 15 recognition

Topic 1: Third Party Releases (cont'd)

Non-Consensual Releases - Harrington v. Purdue Pharma L. P., 144 S. Ct. 2071 (2024)

- *Facts*
  - Purdue Pharma L.P. filed for chapter 11 protection in in the Bankruptcy Court for the Southern District of New York on September 15, 2019, to address growing litigation surrounding its manufacture of the opioid pain reliever, OxyContin.
  - The former owners of Purdue, members of the Sackler family, sought to contribute over four billion dollars to Purdue's bankruptcy estate in exchange for a discharge of any current and future opioid-related claims for alleged actions while the company's owners. The plan was confirmed on September 17, 2021.
  - The confirmation order was vacated on appeal at the district court, but a Second Circuit panel reversed the district court and reinstated the plan in May of 2023 (with some modifications, including more than $1 billion in additional monetary contributions from the Sacklers).
  - The United States Trustee filed an application with the Supreme Court to stay the Second Circuit's decision, which the Court granted and ultimately treated as a petition for a writ of certiorari. Oral argument was held in December 2023.

Topic 1: Third Party Releases (cont'd)

Non-Consensual Releases - Harrington v. Purdue Pharma L. P., 144 S. Ct. 2071 (2024)

- *Holding*
  - The Bankruptcy Code does not authorize a release and injunction that, as part of a chapter 11 plan of reorganization, effectively seek to discharge claims against a nondebtor without the consent of affected claimants.
  - Discharge under section 524(e) of the Bankruptcy Code operates for the benefit of the debtor, and the Sacklers sought what essentially amounted to a discharge without having to file their own bankruptcy petition or place all of their assets on the table.
  - The catchall of section 1123(b)(6), which allows a plan of reorganization to include "any other appropriate provision," does not permit a discharge of the Sacklers because section 1123's previous five sub-paragraphs concern the rights and responsibilities of the debtor. Accordingly, the catch-all should be read to authorize an adjustment of claims without consent only to the extent such claims concern the debtor. If Congress had meant to provide for third party releases, it would have done so expressly.

Topic 1: Third Party Releases (cont'd)

Consensual Releases

- The Purdue decision did not call into question consensual third-party releases or express a view on what qualifies as a consensual release.

- *Related Issues*
  - **"Opt-Out" Structures**
    - Pre-*Purdue*
      - An opt-out structure may be permissible if: (i) the disclosure of the opt-out is "prominent and conspicuous" and (ii) the mechanism for opting-out is simple (i.e., check a box). ***In re Arsenal Intermediate Holdings, LLC***, 2023 WL 2655592 (Bankr. D. Del. Mar. 27, 2023).
    - Post-*Purdue*
      - Failure to return an opt-out form does not amount to consent and releases obtained through an opt-out structure rendered related third-party releases nonconsensual and, thus, impermissible. ***In re Red Lobster Management LLC***, No. 24-02486 (GER) (Bankr. M.D. Fla. July 26, 2024); ***In re Ebix, Inc.***, No. 23-80004 (SWE) (Bankr. N.D. Tex. Aug. 2, 2024).

Topic 1: Third Party Releases (cont'd)

Consensual Releases

- *Related Issues*
  - **"Sophistication"**
    - Does the "sophistication" of a party (i.e., their presumed familiarity with the bankruptcy process), impact what the appropriate mechanism for eliciting consent is?
    - ***In re Endo International plc.***, No. 22-22549 (JLG) (S.D.N.Y. Bankr. Jan. 16, 2024)
      - Parties presumed to be familiar with the bankruptcy process were generally deemed to opt in to releases unless they affirmatively opted out, while parties presumed to be less familiar with the bankruptcy process were generally required to affirmatively opt in. Parties who opted in and granted releases were entitled to enhanced recoveries.

Topic 1: Third Party Releases (cont'd)

Workarounds

- **Gatekeeper Provisions**
  - Plan provisions that require claimants to proceed first in the bankruptcy court against certain non-debtor parties - e.g., exculpated parties.
  - ***Nexpoint Advisors, L.P. v. Highland Capital Mgmt., L.P. (In re Highland Capital Mgmt., L.P.)***, 48 F.4th 419, 426-27 (5th Cir. 2022).
    - Post-confirmation, the bankruptcy court, as gatekeeper - first, determines whether any party seeking to bring a claim against an exculpated party has a "colorable claim;" second, authorizes the party to bring the claim; and third, if the bankruptcy court has jurisdiction over the merits, adjudicates the claim.
- **Chapter 15 Recognition**
  - Prior to Purdue, chapter 15 recognition provided an avenue to approve non-consensual third-party releases embodied in a foreign restructuring plan or scheme.
  - This approach to implementing nonconsensual releases was regularly approved in the Second Circuit.
  - A foreign insolvency proceeding will be granted comity after determining (i) whether the foreign court had jurisdiction, and (ii) whether enforcement will prejudice the rights of U.S. citizens or violate public policy.
  - ***In re Avanti Commc'ns Grp. PLC***, 582 B.R. 603 (Bankr. S.D.N.Y. 2018).
    - Holding: the bankruptcy court granted comity to a scheme of arrangement sanctioned by a Court in England that included nonconsensual third-party releases.

2 Sub Rosa Plan Issues

Topic 2: Sub Rosa Plan Issues

Discussion Topics

- Equity-linked DIPs and Backstop Agreements
  - Why are they problematic?
  - Can limits be placed on them that make them more acceptable?
- Lock-Up Agreements
  - What are the limits on lock-up agreements?
  - When is too early? What information and/or circumstances drives whether a lock up is appropriate?

Topic 2: Sub Rosa Plan Issues (cont'd)

Equity-Linked DIPs

- DIP loans that can be repaid in reorganized equity, and which are approved before the plan process and before plan valuation has been determined.

Equity-Linked Backstop Agreements

- Agreements that permit lenders to convert DIP loans received on account of their backstop commitment into equity in the reorganized company.

Recent Cases

- ***In re WeWork, Inc.***, No. 23-19865 (JKS) (Bankr. D.N.J. Nov. 6, 2023).
  - The debtors sought approval of an "Exit DIP New Money Facility" facility which provided equitization rights to certain prepetition secured creditors for funding the chapter 11 cases.
  - The debtors' former CEO, Adam Neumann, objected, claiming that the arrangement amounted to a sub-rosa plan because it improperly sought court approval of the debtors' entry into a disguised $400 million investment of equity capital in the reorganized debtors outside of the confirmation process.
  - The court overruled Neumann's objection on the grounds that the equity-linked portion of DIP was subject to separate and later approval of the court in connection with confirmation.

Topic 2: Sub Rosa Plan Issues (cont'd)

- ***In re Enviva Inc.***, No. 24-10453 (BFK) (Bankr. E.D. Va. Mar. 12, 2024).
  - The proposed Debtor in Possession loans allowed participating shareholders to convert their loans into equity at a to-be-determined discounted rate. The UCC objected, claiming this arrangement violated the absolute priority rule by allowing equity holders to be paid before unsecured creditors.
  - The court found that the equity being distributed to shareholders was on account of their new capital contributions ($100 million of the $500 million DIP facility) rather than on account of their preexisting equity stakes. An appeal is pending.

Topic 2: Sub Rosa Plan Issues (cont'd)

Lock-Up Agreements

- Agreements that contain provisions that restrict or condition a lender or counterparty's right to vote on a plan.
- **In re GOL Linhas Aéreas Inteligentes S.A.**, No. 24-10118 (MG) (Bankr. S.D.N.Y. Apr. 22, 2024).
  - The debtors asked the Bankruptcy Court to approve a series of stipulations and agreements with lessor counterparties that contained lock-up provisions, which obligated those counterparties to vote in favor of a forthcoming plan even though it would be months before a disclosure statement or plan would be filed.
  - The Bankruptcy Court noted that lock-up provisions may be permissible if (i) there is sufficient information available about the plan that creditors were committing to vote for, and (ii) creditors had meaningful choice to willingly agree during the negotiation phase, or to rescind later based on new information.
  - Applying this standard, the court found that the lock-up agreements were unenforceable because the counterparties did not have adequate information of the plan's terms at such an early stage of the case.

3 Liability Management

Topic 3: Liability Management

Discussion Topics

- Liability Management Transactions
  - How are these transactions structured?
  - What challenges are they susceptible to?
  - What are the expectations for the future?

Topic 3: Liability Management (cont'd)

Background

- Companies often choose to pursue out-of-court "liability management" transactions to address issues in their capital structures without resorting to formal insolvency proceedings.
- Certain types of liability management transactions may face challenges in court by creditors who do not receive the benefit of such transactions, and such litigation can ultimately push a company closer to a chapter 11 filing, the very outcome that liability management transactions generally strive to avoid.

Types of Liability Management Transactions

- **Uptier Transactions**
  - A borrower partners with a coalition of creditors sufficient to approve an amendment to the existing financing documents to allow the borrower to issue new, senior-secured debt that, in substance, primes the existing secured debt held by creditors that did not participate in the transaction.
    - ***Wesco Aircraft Holdings, Inc. v. SSD Investments Ltd. (In re Wesco Aircraft Holdings, Inc.)***, Case No. 23-90611, Adv. No. 23-3091 (Bankr. S.D. Tex. July 10, 2024) (*Incora*).
      - The bankruptcy court unwound a prepetition uptier transaction, restoring the prepetition liens of non-participating creditors. There remains an open question as to whether participating noteholders are entitled to equitable relief for their prepetition contribution, or whether will they be left with only a general unsecured claim.

Topic 3: Liability Management (cont'd)

Types of Liability Management Transactions

- **Double DIP Transactions**
  - » Structure: (i) a new debt issuance by a nonguarantor subsidiary, (ii) an intercompany loan from the nonguarantor subsidiary to the existing credit group (the first dip) utilizing some amount of the proceeds of the new debt, and (iii) a direct or indirect guarantee of the new debt by other entities within the borrower's organizational structure (the second dip).
  - » In the summer of 2023, "Double Dip" financing transactions emerged as a popular strategy for companies seeking to raise short term capital amid soaring interest rates.
  - > **In re Wheel Pros, LLC d/b/a/ Hoonigan**, No. 24-11939 (JTD) (Bankr. D. Del. Sept. 9, 2024).
    - > Wheel Pros became the first entity that participated in the recent surge of "Double Dip" financing transactions to declare bankruptcy in September 2024.

4 Developments in Examiner Appointments

Topic 4: Developments in Examiner Appointments

Discussion Topics

- Examiners - the *FTX* decision on mandatory appointment
  - How much influence will the decision have?
  - Does the decision encourage forum shopping?
  - Does the decision give creditors undue leverage?

Topic 4: Developments in Examiner Appointments (cont'd)

Mandatory Examiner Appointments

- *Bankruptcy Code Section 1104(c)(2)*
  - "[O]n request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.
- ***In re FTX Trading Ltd.***, *91 F.4th 148 (3d Cir. 2024).*
  - The U.S. Trustee moved for the appointment of an examiner pursuant to section 1104(c)(2) of the Bankruptcy Code following allegations of prepetition fraud, embezzlement, and corporate mismanagement. Noting that the appointment of an examiner was discretionary under the Bankruptcy Code, the Bankruptcy Court denied the motion.
  - Holding: Appointment of an examiner under section 1104(c)(2) of the Bankruptcy Code is mandatory if statutory thresholds are satisfied. Based on section 1104(c)(2)'s plain language, the Bankruptcy Court did not have discretion to deny the U.S. Trustee's motion.

Faculty

Hon. Lisa G. Beckerman is a U.S. Bankruptcy Judge for the Southern District of New York in New York, sworn in on Feb. 26, 2021. From May 1999 until she was appointed to the bench, she was a partner in the financial restructuring group at Akin Gump Strauss Hauer & Feld LLP. From September 1989 until May 1999, she was an associate and then a partner in the bankruptcy group at Stroock & Stroock & Lavan LLP. Prior to her appointment, Judge Beckerman served as a co-chair of the Executive Committee of UJA-Federation of New York's Bankruptcy and Reorganization Group, as co-chair and as a member of the Advisory Board of ABI's New York City Bankruptcy Conference, and as a member of ABI's Board of Directors of from 2013-19. She is a Fellow and a member of the board of directors of the American College of Bankruptcy, as well as a member of the National Conference of Bankruptcy Judges (NCBJ) and the 2021 NCBJ Education Committee. She also is a member of the Dean's Advisory Board for Boston University School of Law. Judge Beckerman received her A.B. from University of Chicago in 1984, her M.B.A. from the University of Texas in 1986 and her J.D. from Boston University in 1989.

Jay M. Goffman is co-founder and CEO of Smith Goffman Partners in New York. In this role, he works to preserve and enhance the equity value of companies in or nearing distress. Prior to co-founding the firm, he was with Teneo and was vice chair of Global Advisory at Rothschild & Co., a large international investment bank, where he advised clients across Rothschild's Restructuring, Debt Advisory and M&A practices. Before Rothschild, he spent 36 years as a lawyer focused on restructuring, debt advisory and distressed M&A. For the last 24 years of his legal career, he practiced at Skadden Arps, where he was the global head of its Corporate Restructuring Department. Over the course of his career, Mr. Goffman has consistently been recognized as one of the leading and most innovative restructuring advisors in the world. He was named a "Dealmaker of the Year" by *The American Lawyer* and one of the "Most Influential Lawyers of the Decade" by *The National Law Journal*. He has also received several Lifetime Achievement and Hall of Fame honors, in addition to numerous philanthropic awards. Mr. Goffman is best known for having devised and pioneered the "prepackaged" restructuring, now the predominant method for most major restructurings — which revolutionized the field and has been used to reorganize hundreds of companies in a quick, efficient and cost-effective manner. As a result of his efforts, prepacks are now the predominant method used in major restructurings. Mr. Goffman has successfully reorganized businesses out of court and in court across multiple industries and geographies, including some of the largest, most high-profile and most complex cases in history. Many of his deals and accomplishments have been profiled in various publications, including *The Wall Street Journal*. Mr. Goffman has received numerous honors, including "Most Influential Lawyers of the Decade," Dealmaker of the Year and several Hall of Fame and Lifetime Achievement Awards, in addition to numerous philanthropic honors from AJC, Catholic Renewal, Tina's Wish and the China Institute. Mr. Goffman received his B.S. in 1980 in chemical psychobiology from the State University of New York at Binghamton and his J.D. in 1983 with honors from the University of North Carolina at Chapel Hill, where he was a member of the *University of North Carolina Law Review*. In 2018, the University of North Carolina School of Law presented him with its Distinguished Alumni Award.

Hon. Clifton R. Jessup, Jr. is a U.S. Bankruptcy Judge for the Northern District of Alabama in Decatur, appointed on March 2, 2015. He was formerly a principal shareholder in the Dallas office of the international law firm of Greenburg Traurig, LLP where he concentrated his practice in business reorganization and bankruptcy. During his more than 35 years of bankruptcy-related practice before taking the bench, Judge Jessup represented secured creditors, unsecured creditors, committees, equity-holders, debtors and trustees in federal bankruptcy cases in more than 37 states and Puerto Rico. He also represented purchasers of assets in bankruptcy cases, and served as examiner and mediator in many cases. In 2001, Judge Jessup was selected as the liquidating trustee under the confirmed chapter 11 plan in the Baptist Foundation of Arizona, the largest nonprofit bankruptcy cases filed to date. The cases involved more than 13,000 investors and claims in excess of $600 million. In 2009, he represented the Opus West Corp. in a chapter 11 case involving more than 50 commercial real estate properties in California and Texas with claims in excess of $1.2 billion. Judge Jessup is a member of the Advisory Committee to ABI's Commission to Study the Reform of Chapter 11 and of the Texas State Bar. He received his J.D. in 1978 from the University of Michigan.

Hon. David S. Jones is a U.S. Bankruptcy Judge for the Southern District of New York in New York, sworn in on Feb. 19, 2021. He handles a varied docket that has included numerous chapter 15 matters, as well as the Revlon bankruptcy and several cases involving aviation and aircraft financing. Judge Jones previously clerked for Hon. Morris E. Lasker, U.S. District Judge for the Southern District of New York, from 1990-92, and was in private practice in New York from 1992-96. From 1996 until he was appointed to the bench, he served as an Assistant U.S. Attorney for the Southern District of New York, and at different times served as the chief of the U.S. Attorney's Office's Tax and Bankruptcy Unit, the Office's chief civil appellate attorney and as deputy chief of the Civil Division. Judge Jones was awarded the Justice Department's Director's Award and the New York City Bar Association's Henry L. Stimson Medal, among other awards. He also served as an instructor at the National Advocacy Center, and as an evaluator of U.S. Attorney's Offices throughout the nation. Judge Jones received his A.B. *magna cum laude* from Brown University in 1985 and his J.D. *cum laude* from Harvard Law School in 1990.

Paul D. Leake is a partner and the global head of Skadden, Arps, Slate, Meagher & Flom LLP's Corporate Restructuring Group in New York. He has led numerous large and complex U.S. and cross-border corporate workouts and restructurings for debtors, commercial banks and bank groups, distressed investment funds and investors, noteholder committees and official creditors' committees. Mr. Leake focuses on advising U.S. and transnational businesses on chapter 11 reorganizations, out-of-court restructurings, secured financings, debtor-in-possession loans, distressed acquisitions and sales, and investments in troubled companies. He has led high-profile restructurings in most major industries, including retail, health care, oil and gas, shipping, mining, airlines, energy, publishing, telecom, satellite communications and real estate. He is regularly listed in rankings of leading restructuring lawyers in the U.S. and globally, including *Chambers USA*, *Chambers Global*, *The Legal 500*, *K&A Restructuring Register*, *IFLR1000*, *The Best Lawyers in America* and *Turnarounds & Workouts*. He has published and lectured extensively on U.S. and transnational insolvency matters. Mr. Leake is a member of the board of directors of Her Justice, a nonprofit organization that supports women living in poverty in New York City by recruiting and mentoring volunteer lawyers to provide free legal help to address individual and systemic legal barriers. He also is ABI's Vice President-Publications and a Fellow of the American College of Bankruptcy. Mr. Leake received his B.A. from Amherst College in 1985 and his J.D. from Columbia University in 1988.

Hon. Christopher M. Lopez is a U.S. Bankruptcy Judge for the Southern District of Texas in Houston, appointed on Aug. 14, 2019. He previously was a member of the Business, Finance & Restructuring Group of Weil, Gotshal & Manges LLP and focused on representations ranging from top global corporations in mega-restructurings to middle-market debtor and creditor representations. Judge Lopez lectures across the country on bankruptcy issues. He also serves as an adjunct professor at Thurgood Marshall School of Law. Judge Lopez currently serves as a council member of the State Bar of Texas's Bankruptcy Law Section, an advisor to the State Bar of Texas Young Lawyers Committee, a member of the Nominations Committee for the National Conference of Bankruptcy Judges, and a member of the National Bankruptcy Conference. He received his B.A. in psychlogy in 1996 from the University of Houston, his M.A. in religion in 1999 from Yale Divinity School and his J.D. from the University of Texas School of Law in 2003.