AMERICAN BANKRUPTCY INSTITUTE

2019 Delaware Views from the Bench

Secrets of the Bench Revealed

Hon. Kevin J. Carey (ret.)
U.S. Bankruptcy Court (D. Del.); Wilmington

Hon. Michelle M. Harner
U.S. Bankruptcy Court (D. Md.); Baltimore

Secrets of the Bench Revealed:
An In-depth Conversation with Hon. Kevin J. Carey (Ret.)
Delaware Views from the Bench, October 17, 2019
Michelle M. Harner*

"The future ain't what it used to be."
-Yogi Berra

As I prepare for my conversation with Judge Kevin J. Carey during the 2019 Delaware Views from the Bench, this quote from Yogi Berra comes immediately to mind for at least two reasons. First, Judge Carey is an avid baseball fan, though I think he cheers more for the Phillies than the Yankees. Second, upon his retirement and at least from my perspective, the bankruptcy bench will be missing a thoughtful, compassionate, and exceptionally talented jurist.

Judge Carey has served as a U.S. bankruptcy judge since 2001. He was first appointed to the U.S. Bankruptcy Court for the Eastern District of Pennsylvania. He was then appointed to the U.S. Bankruptcy Court for the District of Delaware in 2005, serving as the district's Chief Judge from 2008–2011. Judge Carey retired from the U.S. Bankruptcy Court for the District of Delaware in August 2019.

During his 18 years on the bench, Judge Carey made significant contributions to the profession through his courtroom proceedings, judicial opinions, and many, many service activities. Although this brief panel overview cannot do justice to his extensive judicial career, I would like to highlight a few notable items:

- Judge Carey was assigned 12,477 cases during his service on the U.S. Bankruptcy Court for the District of Delaware.
- Judge Carey has over 250 reported and unreported decisions published in the Westlaw online research database.[1]
- Judge Carey presided over at least 43 large public company chapter 11 cases.[2] A snapshot of those cases reveals that, on average, the debtors were in bankruptcy for 352 days; had $2.963 billion in assets; had 5,105 employees; and had $1.347 billion in annual sales.[3]

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* United States Bankruptcy Judge, District of Maryland. This overview is written to provide general background and information for Judge Harner's conversation with Judge Carey during the *Secrets of the Bench Revealed* panel.

[1] Based on a Westlaw search conducted on August 26, 2019.

[2] These data are from the UCLA-LoPucki Bankruptcy Research Database ("BRD"), which maintains data on large public company bankruptcies since October 1, 1979. The BRD defines large as follows: "A case is 'large' if debtor reported assets o[f] more than $100 million (measured in 1980 dollars) on the last form 10-K that the debtor filed with the Securities Exchange Commission before filing the bankruptcy case." Contents of the BRD, available at http://lopucki.law.ucla.edu/contents_of_the_webbrd.htm.

[3] The data summary discussed in this overview is based on a one-variable study run through the BRD on August 26, 2019. The BRD allows pubic users to run various studies through the database. The one-variable study mentioned in this overview was performed simply to provide background and should not be cited or referenced for other purposes.

- Judge Carey has issued many significant decisions during his judicial career. A summary of a few select decisions is attached to this overview as Appendix A.[4] In addition, it is worth noting that his valuation opinion in *In re Exide Technologies*, 303 B.R. 48 (Bankr. D. Del. 2003), has been cited in at least 56 other judicial opinions and 143 secondary sources (including 56 law review and journal articles).[5] In addition, at least one former law professor used the decision extensively in teaching valuation methodology in her Corporate Finance classes at the University of Nebraska College of Law and the University of Maryland Francis King Carey School of Law.[6]
- Judge Carey serves as an Adjunct Professor of Law at St. John's University School of Law and at Temple University's Beasley School of Law.
- Judge Carey is Vice President of Membership of the American Bankruptcy Institute and a member of ABI's Executive Committee.
- Judge Carey is a past Global Chair of the Turnaround Management Association.
- Judge Carey has been honored by many industry organizations, including AIRA (2009 judicial recognition award), NYIC (2012 Conrad Duberstein Memorial Award), and M&A Advisors (2017 Leadership Award).
- Judge Carey is a Fellow of the American College of Bankruptcy and a member of the International Insolvency Institute.

My conversation with Judge Carey during the Delaware Views from the Bench will cover several different topics and offer insights into his approach to the bench and the practice more generally. It will be difficult to cover all relevant topics in 60 minutes, but I will endeavor to elicit Judge Carey's thoughts on some of his key decisions (including those noted herein), trends in the practice, and tips for practitioners. Regardless of how much we cover, it is sure to be an interesting and engaging conversation.

[4] Many thanks to Judge Carey for preparing Appendix A.
[5] Based on a Westlaw search conducted on August 26, 2019.
[6] For context, I was a professor at the University of Nebraska College of Law from 2006–2009, and at the University of Maryland Francis King Carey School of Law from 2009–2017. Judge Carey also was gracious enough to serve as a guest lecturer in my Corporate Finance class at the Georgetown University Law Center in 2015.

Appendix A

July 25, 2019

Judge Kevin J. Carey, United States Bankruptcy Court for the District of Delaware

Judge Carey was appointed to the United States Bankruptcy Court for the Eastern District of Pennsylvania on January 25, 2001. While serving on that Court, Judge Carey was designated by the Third Circuit Court of Appeals to serve also as visiting judge in the Bankruptcy Court for the District of Delaware. On December 9, 2005, Judge Carey received a full time appointment to the United States Bankruptcy Court for the District of Delaware. He served as the Court's Chief Judge from 2008 – 2011.

Judge Carey earned his B.A. in 1976 from The Pennsylvania State University, where he was honored with the 1976 Ralph Dorn Hetzel Memorial Award, which recognizes a combination of high scholastic attainment together with participation and leadership in student activities. He received his J.D. in 1979 from the Villanova University School of Law.

Judge Carey began his professional career as law clerk to Bankruptcy Judge Thomas M. Twardowski (now retired), then served as Clerk of Court of the Bankruptcy Court for the Eastern District of Pennsylvania, the Court's top administrative post.

Judge Carey entered private law practice in Philadelphia in 1982, concentrating in the areas of bankruptcy, commercial lending, corporate transactions and commercial real estate and development. During this time he represented chapter 11 debtors, secured and unsecured creditors, lenders, real estate developers, landlords and buyers and sellers of businesses. In 2001, he left Fox Rothschild O'Brien & Frankel in Philadelphia to accept his appointment to the bankruptcy bench.

In 2016, Judge Carey completed six-years of service as the bankruptcy judge member on the Space and Facilities Committee of the Judicial Conference of the United States, an appointment made by Chief Justice Roberts. Judge Carey also served on the Third Circuit Judicial Council's Facilities and Security Committee and the Administrative Office's Bankruptcy Judge Advisory Group as the Third Circuit representative.

Judge Carey is an adjunct professor in the LL.M. in Bankruptcy degree program at St. John's University School of Law in New York City and at Temple University's Beasley School of Law in Philadelphia. He is a contributing author to a leading treatise, Collier on Bankruptcy and Collier (Commercial) Forms Manual.

Judge Carey is active in a variety of professional associations. He is Vice President of Membership of the American Bankruptcy Institute and a member of ABI's Executive Committee. He is a past Global Chair of the Turnaround Management Association. He is also a member of the National Conference of Bankruptcy Judges. Judge Carey has spoken frequently at international, national, regional and local conferences for the American Bankruptcy Institute, Turnaround Management Association, Association of Insolvency and Restructuring Advisors, New York Institute of Credit and others, including M&A Advisors.

He received a judicial recognition award from AIRA in 2009 for contributions to the bankruptcy and restructuring professions, the Conrad Duberstein Memorial Award from NYIC in 2012 for excellence and compassion in the judiciary, and the 2017 Leadership Award from M&A Advisors. Judge Carey is an honorary member of the Turnaround, Restructuring and Distressed Investing Hall of Fame. He is a Fellow of the American College of Bankruptcy and a member of the International Insolvency Institute.

While on the Delaware Bankruptcy Court, Judge Carey presided over a number of large and significant chapter 11 bankruptcy cases, including Exide Technologies, New Century TRS Holdings, Inc., Tribune Company, Spansion, Inc., AbitibiBowater, Inc., Abiensa Holdings, Inc., and the Woodbridge Group of Companies, LLC. He authored opinions analyzing competing business valuations in cases such as Exide Technologies and American Classic Voyages. He tackled plan confirmation issues in Spansion, Inc., AbitibiBowater, Inc., Tribune Company and, more recently, Woodbridge Group of Companies, LLC. His opinions have examined Bankruptcy Code provisions in detail, such as his Pillowtex Corporation opinion deconstructing the new value defense to preference actions of Bankruptcy Code § 547(c)(4), and his Filene's Basement opinion reviewing the limitation on landlord damages claims in Bankruptcy Code § 502(b)(6).

A few decisions of note include:

Exide Technologies, 303 B.R. 48 (Bankr. D. Del. 2003).

Judge Carey denied confirmation of the debtor's chapter 11 plan. After analyzing the debtor's enterprise value, Judge Carey determined that a proposed settlement and release of claims against prepetition lenders was not fair and equitable and could not be approved over the objection of the unsecured creditors, who had voted overwhelmingly against the plan. This was Judge Carey's first contested valuation opinion.

American Classic Voyages Co. v. JP Morgan Chase Bank (In re American Classic Voyages Co.), 367 B.R. 500 (Bankr. D. Del. 2007), aff'd 384 B.R. 62 (D. Del. 2008).

A cruise line filed a chapter 11 bankruptcy case after its operations were disrupted severely by the attacks of September 11, 2001. The debtors (through the plan administrator) filed a preference suit to avoid payments made to certain banks within 90 days prior to the bankruptcy filing. The defendants sought to rebut the presumption of insolvency found in Bankruptcy Code §547(f). Judge Carey held that the evidence showed that the debtors were operating as a "going concern" on the transfer date and that the debtors failed to prove insolvency.

In re Spansion, 2009 WL 1531788 (Bankr. D. Del. June 2, 2009).

Judge Carey denied a motion for approval of a settlement agreement resolving patent infringement claims asserted by the debtors against Samsung Electronics Co., Ltd before the International Trade Commission and in Delaware District Court, as well as counterclaims and

patent infringement claims asserted by Samsung against the debtors' Japanese subsidiary in Tokyo District Court, Japan. An ad hoc consortium of noteholders argued that the settlement agreement had several structural flaws, despite including a $55 million payment to the estate. Upon review of the evidence, and in light of Bankruptcy Rule 9019 and the Third Circuit's *Martin* factors (based on *In re Martin*, 91 F.3d 389 (3d Cir. 1996)), Judge Carey determined that the debtors failed to prove that their evaluation of the settlement was based on sound business judgment. Judge Carey could not conclude that the settlement agreement was fair, reasonable and in the best interests of the estate. Reports later revealed that the debtor was able to achieve a much larger settlement payment.

Wahoski v. American & Efrid, Inc. (In re Pillowtex Corp.), 416 B.R. 123 (Bankr. D. Del. 2009).

In this opinion, Judge Carey examined the new value defense to preference actions found in Bankruptcy Code § 547(c)(4) and determined that the "subsequent advance" approach to the new value defense was consistent with both the plain language and underlying purposes of § 547(c)(4), despite *dicta* in the Third Circuit case *In re New York City Shoes, Inc.*, 880 F.2d 679 (3d Cir. 1989) that the parties argued was contrary to that view.

In re Tribune Company, 464 B.R. 126 (Bankr. D. Del. 2011) *modified on reconsid.* 464 B.R. 208 (Bankr. D. Del. 2011) *aff'd* 587 B.R. 606 (D. Del. 2018).

The chapter 11 bankruptcy case of Tribune Company and its affiliates occurred approximately one year after it completed a more than $10 billion leveraged buy-out. The major constituents understood that an investigation and resolution of the LBO-related causes of action would be a central issue in the formulation of a plan of reorganization. An examiner was appointed and his assigned duties included evaluating the potential causes of action. The examiner prepared an extensive report that did not reach definitive conclusions but suggested a range of potential outcomes for the claims. Mediation began and was partially successful. Four competing plans were filed; ultimately two competing plans went forward at the confirmation hearing.

After an extensive hearing on confirmation of the plans, Judge Carey issued a lengthy opinion that denied confirmation of both plans for different reasons. A major component of the debtors' joint plan was the settlement of the LBO-related causes of action. The opinion examined the settlement in detail, compared it to the examiner's report, and determined it fell within the range of reasonable litigation possibilities and was approved by creditors across the debtors' capital structure. Judge Carey determined that the debtors' joint plan did not meet the requirements for confirmation under Bankruptcy Code § 1129 because (i) the plan was not accepted by at least one impaired class for each debtor; (ii) certain release and exculpation provisions in the plan were too broad to be fair and equitable; and (iii) the plan did not comply with Bankruptcy Code § 510(b) by unfairly subordinating certain claims.

Judge Carey then considered both plans in light of Bankruptcy Code § 1129(c) which provides that when confirmation requirements are met for more than one plan, the court shall

consider the preferences of creditors and equity security holders and determine which plan to confirm. Based, in part, of the voting results and other considerations, Judge Carey determined that the debtors' joint plan would survive the test of § 1129(c). Later, the debtors' joint plan was revised to comply with all confirmation requirements and was confirmed in July 2012.

In re KB Toys, Inc., 470 B.R. 331 (Bankr. D. Del. 2012) *aff'd* 736 F.3d 247 (3d Cir. 2013).

Judge Carey held that purchasers of chapter 11 debtors' trade claims identified on the statement of financial affairs as having received potentially avoidable payments within 90 days of commencement of the bankruptcy case took those claims subject to the same rights and disabilities as the original, selling creditors.

In re Filene's Basement, LLC, 2015 WL 1806347 (Bankr. D. Del. Apr. 16, 2015).

In this decision, Judge Carey analyzed Bankruptcy Code § 502(b)(6)(A), which limits a landlord's damage claim resulting from the termination of a real property lease to "the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease." The landlord argued that the statute capped its claim at 15% of the remaining amount of rent due. The debtors argued that § 502(b)(6)(A) refers to 15% of the *time* left on the lease. Other decisions on the issue were divided. Judge Carey determined that plain language of § 502(b)(6)(A), as well as the legislative history and the policy behind capping a landlord's claim for lease termination damages, supported the "time" approach.

In re Northshore Mainland Services, Inc., 537 B.R. 192 (Bankr. D. Del. 2015).

This case involved a group of debtors whose primary asset was a 3.3. million square foot resort complex located in Cable Beach, Nassau, The Bahamas that was under development. One debtor, Northshore Mainland Services, Inc., was incorporated under Delaware law. The other affiliated debtors were incorporated and organized under the laws of the Commonwealth of The Bahamas. After numerous missed construction deadlines, the debtors were unable to open the resort and generate revenue, resulting in a severe liquidity crunch. The debtors filed chapter 11 in June 2015. In July 2015, the Bahamian Attorney General issued an application for the appointment of provisional liquidators for the Bahamian debtors and, at the same time, presented a petition to the Bahamian Supreme Court seeking orders for the winding up of all the Bahamian debtors' business. Creditors moved to dismiss the Delaware chapter 11 cases, arguing in part, that the best interests of the debtors and creditors would be served by dismissal so the parties could proceed with insolvency proceedings in The Bahamas. Judge Carey held that the debtors met the eligibility requirements of Bankruptcy Code § 109(a), and the cases were not filed in bad faith; however, considerations of comity supported abstention pursuant to Bankruptcy Code § 305(a). Judge Carey held that the best interests of creditors and the debtors warranted dismissal of the cases (except for the one debtor organized under Delaware law).

In re Intervention Energy Holdings, LLC, 553 B.R. 258 (Bankr. D. Del. 2016)

Pre-bankruptcy, the debtor entered into a forbearance agreement with its secured lender to amend the debtor's limited liability governance document to require unanimous consent for the filing of a bankruptcy petition. The debtor then issued a single common unit to the creditor for a capital contribution of $1.00, making the creditor a common member of the debtor. The creditor moved to dismiss the debtor's chapter 11 bankruptcy case, arguing that the debtor lacked authorization to file the petition without its consent. Judge Carey determined that when the sole purpose and effect of an agreement is to eviscerate the right of an entity to seek federal bankruptcy relief, the agreement is tantamount to an absolute waiver of that right and is void as contrary to federal public policy. Judge Carey joined other courts holding that the right to file bankruptcy protection as authorized by the U.S. Constitution and enacted by Congress applies to a corporate or business entity, including the LLC in this case.

In re Nuverra Environmental Solutions, Inc., Case No. 17-10949, D.I. 363 (transcript July 24, 2017) *aff'd* 2017 WL 3326453 (D. Del. Aug. 3, 2017).

The parties negotiated a global settlement that formed the basis of a plan of reorganization in a case in which unsecured creditors were "out of the money" because secured creditors held debt of over $500 million dollars in a company that had an uncontroverted value of $300 million. The negotiated plan provided that certain trade and other creditors whose debts arose out of the debtor's day to day operations were classified together and would receive payment in full, while unsecured noteholders were classified separately and would receive approximately 4%- 6% recovery on their claims. One unsecured noteholder objected to plan confirmation. Judge Carey determined that the plan's separate classification of noteholder claims from the claims arising out of the debtors' day to day operations was reasonable. Judge Carey also determined that the plan overcame the rebuttal presumption of unfair discrimination because the plan was consistent with Third Circuit precedent that allowed "horizontal gifting." Judge Carey distinguished *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (Mar. 22, 2017), which involved a structured dismissal, rather than a plan of reorganization.

In re Woodbridge Group of Companies, LLC, 2018 WL 3131127 (Bankr. D. Del. June 20, 2018).

The debtors are a real estate development group, and one of the debtors (Woodbridge Mortgage Investment Fund 3A, LLC) issued promissory notes containing an anti-assignment clause that prohibited assignment without the debtor/borrower's written consent and "any such attempted assignment without such consent shall be null and void." The promissory notes were

transferred to Contrarian Funds, LLC, which filed a proof of claim asserting a secured claim against the Fund. Judge Carey sustained the debtors' objection to Contrarian's proof of claim, deciding that the express language of the anti–assignment clause provided a clear intent to restrict the power to assign, as opposed to restricting only the right to assign, and that such restriction did not violate Delaware law. Judge Carey further held that the debtors' breach of the promissory notes did not render the anti-assignment clause unenforceable reasoning that the non-breaching party cannot emerge post-breach with more rights than it held pre-breach.

Gavin/Solomonese LLC, Liquidation Trustee v. Citadel Energy Partners, LLC (In re Citadel Watford City Disposal Partners, L.P.), Case No. 15-11323, Adv. No. 17-50024 (Bankr. D. Del. May 2, 2019).

The Liquidating Trustee filed claims against officers and directors, including derivative claims for breach of fiduciary duty. The defendants moved to dismiss those claims for lack of standing. Judge Carey held that Delaware law regarding limited partnerships and limited liability companies restricts standing for derivative claims to "partners or assignees of a partnership interest" or "members or an assignee of a limited liability company interest" at the time of bringing the action. Therefore, an unsecured creditors committee does not have standing to pursue derivative claims and, as assignee of claims from the unsecured creditors committee under the confirmed plan, the Liquidating Trustee cannot receive any greater rights than those held by the assignor.