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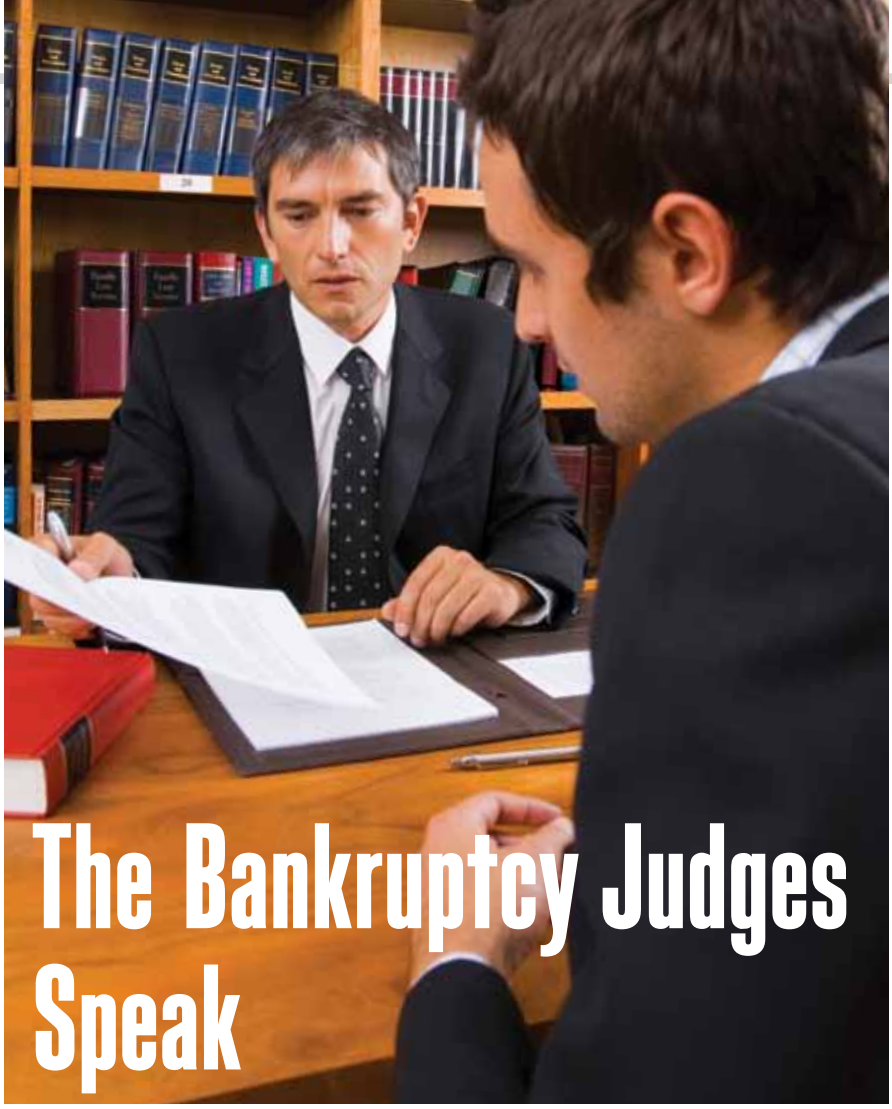

Chapter 11 Litigation: The Bankruptcy Judges Speak

Interviews with six District of Delaware jurists offer insights and guidance on case management and procedural preferences.

Litigators must know the procedural preferences of the judge presiding over their case. This insight can make the difference between a case that runs smoothly and one that does not.

To this end, Chief Judge Kevin Gross and Judges Kevin J. Carey, Brendan L. Shannon, Christopher J. Sontchi, Mary F. Walrath and Peter J. Walsh of the United States Bankruptcy Court for the District of Delaware graciously sat for interviews to discuss their views on case management and trial issues that are of use to attorneys appearing before them.

A Brief Overview

Litigation in chapter 11 cases can take one of two forms: adversary proceedings and contested matters. An adversary proceeding is commenced by the filing of a complaint in the Bankruptcy Court. The adversary action proceeds much in the same fashion as a civil action in the District Court of Delaware, but culminates in a bench trial before the Bankruptcy Court with a right of review by the district court.

While an adversary proceeding is necessarily related to the underlying chapter 11 case, it has its own docket and generally proceeds on its own calendar.

By contrast, a contested matter plays out entirely in the main case, usually commenced by the filing of a motion to which one or more objections are filed. By default, contested matters are subject to fewer procedural rules than adversary proceedings (*e.g.*, with respect to discovery and pretrial motion practice), though the Bankruptcy

Court can order otherwise.

The business of the main case, including the resolution of contested matters, is conducted at regularly scheduled omnibus hearings and any special hearings that may be scheduled by the Court. All substantive motions filed in the main case must be noticed for a hearing, with an objection deadline usually seven days before the hearing. In the absence of an objection, the movant may file a Certificate of No Objection (CNO) and submit it to chambers along with the motion and proposed order, which is typically entered by the Court without further notice or hearing.

Two business days prior to a scheduled hearing, counsel for the debtor(s) files and delivers to chambers an "agenda" of any matters going forward at that hearing, or for which a CNO has been filed but the order not yet entered. For any matters going forward, chambers also will receive a "hearing binder" containing all pleadings and other related documents.

The parties may then present evidence and oral argument on the various contested matters. The pace of bankruptcy proceedings and the numerous filings involved require that counsel communicate often with the Bankruptcy Court to bring chapter 11 cases to a timely resolution.

The Form and Manner of Communications with Chambers

The bankruptcy judges uniformly agree that communicating with chambers is essential to the effective management of litigation matters, though the judges differ slightly as to how frequently, and in what manner, the parties should communicate with chambers.

Reporting Major Case Developments

The judges typically eschew news coverage of their pending cases and letters to chambers are disfavored. If there has been a major development in a case and counsel wishes to apprise the Court, counsel may request a status conference at the next omnibus hearing.

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If more immediate action is necessary, counsel may call chambers to request a special status conference. As Judge Gross explained, "I never mind somebody calling and saying we just want to talk to the judge for five minutes to let him know what is going on in the case."

"Those kinds of calls," he said, "I will take in an instant."

Apprising Chambers of Evidentiary Hearings

Evidentiary hearings are another factor driving the need for communication with the Court. Judges do not know with certainty which contested matters are going forward at an omnibus hearing until they receive an agenda and hearing binder from counsel two days before the hearing. Even then, the Court may not know that the parties intend to present testimony at the hearing.

Because the Court typically schedules omnibus hearings for one hour, Judges Gross and Sontchi emphasized the need for counsel to apprise the Court in advance of counsels' intention to present witness testimony, including the number of witnesses and an estimate of the length of the hearing.

Advance notice permits the Court to reschedule other matters to accommodate an evidentiary hearing, to the extent possible, and to prepare accordingly in advance of the hearing. Judge Gross emphasized the importance of maintaining "very active communication" with the courtroom deputy regarding the need for evidentiary presentations.

Presenting Discovery Disputes

When asked how she prefers to be advised of a discovery dispute, Judge Walrath said, with a grin: "I don't. Work it out."

Joking aside, Judge Walrath, like the other bankruptcy judges, has preferred procedures to deal with discovery disputes that differ, at times, from the procedures set forth in the local bankruptcy rules.

U.S. Bankruptcy Court Rule 9013-1(b) provides that a party must seek relief by written motion or oral motion in open court; letters from counsel will not be considered. Discovery motions must generally be heard on at least seven days' notice per Rule 7026-1(a).

Judges Walrath and Walsh prefer that parties apprise the Court of a discovery dispute by filing a motion in accordance with the local bankruptcy rules, though both acknowledged that they would accept a telephone call to chambers if an issue arises during a deposition that requires an immediate ruling.

Judge Carey prefers that the parties present a discovery dispute through short letters, a procedure he typically builds into his scheduling orders in adversary proceedings. Under his procedure, the moving party e-files a letter discussing the dispute with supporting exhibits, if any, and provides a courtesy copy to opposing counsel. Forty-eight hours later, the non-movant e-files a short reply letter with any relevant

exhibits and provides a courtesy copy to the movant's counsel.

Judge Carey reviews the parties' letters to determine whether the dispute can be resolved by a teleconference or if further briefing is necessary in accordance with the local bankruptcy rules.

By contrast, Judges Shannon, Sontchi and Gross prefer to be informed of the dispute telephonically. After hearing from the parties, these judges either issue a ruling or instruct the parties to provide written submissions. Judge Shannon explained the evolution of his discovery dispute procedure: "I used to think I wanted short emails, and I found I was getting long emails." The number of discovery disputes dropped after he implemented his telephonic procedure.

Judge Shannon surmised that, "There are an awful lot of calls that don't come because somebody gets on the phone and says, 'Is that really your answer? Because we are going to have [the judge] on the phone in 15 minutes. You can tell *him* that.'"

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Citing Bare Orders as Precedent

One point on which the judges agree – *strongly* – is that citing bare orders as precedent in a motion or brief is not effective. Indeed, at different points, the judges described the citations as "annoying," "irrelevant," "meaningless," and "unhelpful."

Judge Shannon noted that citation to bare orders could have some utility – though he emphasized a "*very*, *very* limited utility," and then only in the context of a highly specialized request for relief.

By way of example, he offered that citing bare orders *might* be useful in connection with a motion to establish equity trading procedures to protect the debtor's tax attributes.

Trial Practice

The judges also shared a few thoughts about trial practice and procedure in Bankruptcy Court. Most agree that subject-matter expertise in bankruptcy, while important, does not necessarily carry the day at a contested evidentiary hearing. The ability to examine witnesses and raise and argue evidentiary objections effectively is equally critical.

Using Witness Binders

The judges largely agreed that witness binders – containing copies of the specific subset of trial exhibits that will be referenced in a particular witness's testimony – are helpful to the Court and should be used whenever possible.

Judge Sontchi recommended that the exhibits in the witness binder be placed in the order of presentation to the witness whenever the situation permits.

Courtroom Technology

Interestingly, the judges' views on the use of courtroom technology differed significantly. Judge Gross was the most enthusiastic about the use of courtroom technology. He recommended that "[a]ny key facts or any key documents that you might be relying

upon – put them up. It's to your advantage as well as helping me because it reinforces everything."

Judges Walrath and Carey are also open to the use of courtroom technology. Judge Carey explained that "whatever counsel thinks is the best way to tell the story is how they should tell it and I can pretty much follow anything as long as the story is well told."

Judge Walrath cautioned that the "technology is only as good as its user." Thus, counsel should use the technology only if they can do so effectively.

Judges Sontchi and Walsh were less enamored with the use of courtroom technology. Judge Sontchi did note, however, that it might be useful to present a particularly complex piece of evidence in a compelling way during trial. For his part, Judge Walsh said, "As long as it's on paper, and it's in front of me, that's all I need."

Objections to Questions

Given the limited time available for evidentiary hearings (several of which often go forward at the same omnibus hearing), one might think that time-consuming objections to questions – particularly as to form – may annoy the judges. Judge Walsh is not bothered by them, however. And Judge Carey rarely finds them annoying, given the parties' need to protect the record on appeal.

Judge Sontchi expressed some skepticism toward objections to questions, given that it is a bench trial. The bigger problem, in his view, is when counsel is unable to promptly articulate the basis for the objection after it is made.

Judge Gross noted that counsel object to questions too often. In his experience, the questions are usually harmless, and the objections are rarely sustained.

Judge Walrath agreed on the harm point: "Really, if you think about it, how many of our cases come back [on remand] because the judge didn't sustain an objection to a question?" ◆