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Business Law Section

Insolvency Law e-Bulletin

The following is a profile of the Honorable Thomas B. Donovan – the sixth in a series of profiles of Ninth Circuit bankruptcy judges. Judge Donovan and members of the Insolvency Law Committee met in his chambers and discussed his personal and professional background, observations from the bench, and issues of interest.

Judge Donovan was appointed to the bench in March 1994, and reappointed in 2008. Although his current term expires in 2022, he plans to retire as of March 24, 2017.

Two Paths

Judge Donovan grew up in San Jose, California. In high school, he was a competitive golfer, and considered a professional career in the sport. Instead, he enrolled in college and married his high school and college classmate during his junior year. He reflects that he could not imagine his wife being excited about the prospect of him choosing a professional golf career, and clarifies that in those days such a career did not offer the same benefits that it does now.

The judge spent two years at San Jose State College and transferred to the University of California at Berkeley, where he received his BA degree in 1957. For the next two years, he served in the U.S. Army Security Agency, where he held a position that was “top secret, fun, interesting and gave [him] an opportunity to roam around Washington, D.C.” When the Army learned about his golf skills, he “was ordered to play golf” for the Army’s team. That got the judge an extra day off from his military duties each week. After two years in the military, Judge Donovan had the opportunity to stay in the Army, leave government service, or take another position with another governmental agency. “I could have written my own ticket,” he says. Instead, he chose to enroll in law school back in California, ending his path toward a career in golf.

The judge last hit a golf ball fourteen years ago, joking that he’s a five-time recovering golfer. He readily admits that he had an obsession with the game and found that being a judge and a golfer were both “all-consuming” and incompatible. He chose the bench over the fairway.

Before Taking the Bench

After law school at Boalt Hall, at the University of California, Berkeley, the judge spent a brief time as an associate at Covington and Burling in Washington, D.C. He and his wife returned to California in 1964, and Judge Donovan joined Dinkelspiel and Dinkelspiel, an eleven-attorney, seven-partner firm in San Francisco, California.

On his first day at the new firm, the bankruptcy partner handed the judge an assignment on a case where the firm represented the chapter 7 trustee. The case involved an issue under the Bankruptcy Act where the debtor wrote checks post-petition from a corporate bank account, and the trustee filed suit against the bank to recover the funds. When Judge Donovan prevailed in

the bankruptcy and district courts, the bank appealed to the United States Court of Appeals for the Ninth Circuit.

Having done such a great job to that point, Dinkelspiel let Judge Donovan argue the appeal. Though he wanted to argue the case on the merits, “in a fit of conscience” at the start of oral argument, Judge Donovan told the appellate panel that, because the trustee had in fact received the disputed funds from the debtor, the appeal might be moot. The judges on the panel huddled together and, after what appeared to be some “snickering,” announced that argument on the merits should proceed and “we’ll see what happens.” In a unanimous decision, the panel ruled in favor of Judge Donovan’s client on the merits.

The bank filed a Petition for Writ of Certiorari with the Supreme Court, which was granted. The judge’s first assigned case at the Dinkelspiel law firm had become a United States Supreme Court case and, only four years out of law school, the judge was allowed to present at oral argument. He notes that he argued the case vigorously and that “it was fun to match wits with the justices.”

While his opponent was barely challenged, Judge Donovan’s time was extended for twenty minutes by the court to accommodate the barrage of questions he received. At the end of oral arguments, the clerk of the court shook his hand and told him it was a great argument. A month later, the Supreme Court reversed. Six justices joined the majority decision authored by Justice Douglas, with Justice Harlan dissenting and Justice Fortas writing separately that he would remand the case with instructions to dismiss. See *Bank of Marin v. England*, 385 U.S. 99 (1966). Regardless of the outcome, it is clear that the judge thoroughly enjoyed his experience arguing before the Ninth Circuit Court of Appeals and the U.S. Supreme Court. To read the Supreme Court’s opinion in the *Bank of Marin v. England*, click here:

<http://tinyurl.com/gvxvddj>.

Judge Donovan remained at the Dinkelspiel firm for five years, was elected partner, but instead decided with four of his friends at the firm to leave to create a new law firm that eventually became the law firm of Dinkelspiel, Donovan and Reder. Starting the new firm was a big risk because “we all had small kids and mortgages.” However, he reminisces that things “worked out nicely and that, since then, nobody ever told me what to do or how to do it. It was all on me.”

Around the age of 43, the judge took a three-month sabbatical. He asked the presiding judge for the Oakland-Piedmont Municipal Court, a social friend, whether he could volunteer at the court for about a month. On his first day at the court, to his surprise his friend handed him a robe and showed him to a courtroom. For the next month, Judge Donovan presided over approximately 800 small claim cases, heard the law and motion calendar, acted as a settlement officer, and presided over a civil trial. “I loved the experience of hanging out with the judges and seeing how they related to each other.”

Partly based on that experience, Judge Donovan decided that he wanted to serve as a bankruptcy judge, but waited until his two children graduated from college before applying. Though he lived in Berkeley, he recognized that the bankruptcy judges in the Northern District of California were all fairly young and had ten or more years left on their 14-year terms, so there were likely very few positions to become available. After coming in as a finalist for a single opening in the Northern District, he applied for a position that opened in the Central District of California. This time, he was offered, and accepted, the judicial appointment.

Observations from the Bench

The judge speaks glowingly about his permanent law clerk, Candace Crociani. "She's my partner and chief of staff. Everyone knows and likes her. She also keeps me from wandering off in a direction that I shouldn't be going in." Judge Donovan adds, "We get a lot of routine issues and about 1-3 tricky issues per week. It's the difficult issues that take up most of our time. Without those cases, though, the job wouldn't be as interesting." The judge's management style involves "a lot of collaboration with the law clerks and externs. We talk a lot about the tough issues." Judge Donovan's ultimate test on each decision is whether it is "fair, just and correct. I don't want to impact people unfairly. I want to do right by everyone." The judge enjoys being a trial judge, and does not spend time worrying about how issues might come out on appeal.

Making History

Judge Donovan has presided over a number of high profile cases. One such case is *Law v. Siegel*, involving the bankruptcy court's authority to surcharge the homestead exemption of a debtor who engaged in certain misconduct. The case made its way to the United States Supreme Court, which held that, under the circumstances of that case, the Chapter 7 trustee could not surcharge the debtor's homestead exemption to pay for his legal fees. Click here for the full decision: <http://tinyurl.com/zqa9e5j>.

Judge Donovan was also presented with the important landmark issue of whether a same-sex married couple could jointly file a chapter 13 petition. The case was originally Judge Ahart's case, but became Judge Donovan's case when Judge Ahart moved to the Woodland Hills courthouse. The Office of the United States Trustee filed a motion to dismiss the case on the grounds that the debtors did not have the right to file a joint petition based on the Defense of Marriage Act (DOMA).

The debtors and their attorney Peter Lively approached David Stern and Robert Pfister of Klee Tuchin Bogdanov & Stern LLP to help, and they agreed. Stern, Pfister and Lively filed a roughly one hundred-page brief that Judge Donovan describes as "the best brief I've ever read." The other bankruptcy judges in the Central District were tracking the case closely and asked Judge Donovan to share his decision before it was issued. The judge agreed to do so, but let the other judges know that the decision would be his own. He spent every free hour he had reviewing cases and considering the issue. He concluded that the married debtors had a constitutional right to file a joint petition, and that dismissing the petition based on DOMA would violate the debtors' due process and equal protection rights. The judge circulated his final draft decision to his Central District colleagues and was surprised that 19 of them voluntarily joined him in signing the decision supporting the right of the debtors to file a joint petition. Following a short-lived appeal that was quickly withdrawn, the Department of Justice announced that it would no longer defend DOMA. Judge Donovan dismisses suggestions that he was "brave" to issue his decision in *In re Balas and Morales*. "I ruled based on what I concluded was the correct interpretation of the law. I just did my job." To read the Memorandum of Decision in *In re Balas and Morales*, click here: <http://tinyurl.com/gshnrjp>.

The Next Chapter

The judge's current term on the bench expires in March 2022, but he is retiring this coming March 2017. Despite his and Judge Richard M. Neiter's upcoming retirement, the judge notes that the Ninth Circuit has not announced any intent to appoint new judges to fill the two empty

seats. “There are not enough cases to warrant a new appointment. In my 22 years on the bench, it’s never been so slow.” The judge reflects that “it’s really been a privilege to serve as a judge. I feel really lucky that the powers-that-be gave me the opportunity. It has been challenging, fun and a serious responsibility.”

In a move that may surprise bankruptcy practitioners, in retirement, Judge Donovan plans to study astrophysics; in particular, what we know about the universe and recent developments. “I’d like to befriend an astrophysics professor at Cal Tech and follow them and learn.” Although Judge Donovan may still hear some cases post-retirement, it seems more likely that he will delve into other issues of interest with the same level of attention that he has given to the law as an attorney and judge for fifty-five years.

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Thank you for your continued support of the Committee.

Best regards,

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