

DEBTOR/CREDITOR COMMITTEE

By Henry M. Karwowski

Honorable William F. Touhey United States Bankruptcy Judge from 1986 - 2000



The Honorable William F. Touhey recently retired after nearly fourteen years of service as a judge in the United States Bankruptcy Court for the District of New Jersey. Distinguished for his intellect, pragmatism, tact, and temperament, Judge Touhey leaves an indelible mark on bankruptcy law in this state and in this country. The following is a summary of but a few of his noteworthy decisions.

In *In re Perez*, 220 B.R. 216 (Bankr. D.N.J. 1998), Judge Touhey held that the Bankruptcy Court lacks subject matter jurisdiction to enter an order restoring a debtor's driving privileges. Noting the "identity of interest" existing between municipal judges and the Director of the New Jersey Division of Motor Vehicles, he found that issuance of such an order, either to a municipal judge or directly to the DMV, would have the effect of compelling the State of New Jersey either to act or refrain from acting with respect to its licensing practice and procedures. *See id.* at 224. Hence, Judge Touhey found, issuance of such an order would interfere with the State of New Jersey's Eleventh Amendment immunity from federal suit. *See id.*

In *In re Bressman*, 214 B.R. 131 (Bankr. D.N.J. 1997), Judge Touhey held that a debtor's counsel could not utilize a pre-petition, nonrefundable fee as payment for defending the debtor in dischargeability litigation. The parties had intended the fee to represent full payment for the firm's agreement to litigate the dischargeability litigation. *See id.* at 140-41. Although permissible under New Jersey law, such an "advance payment retainer," Judge Touhey determined, constitutes property of the estate. *See id.* at 140-42. Moreover, pursuant to the parties' retainer agreement, the debtor had retained a right of refund of any unearned balance of the fee, as well as a right of refund to any portion of the fee deemed excessive for the reasonable value of the services performed. *See id.* at 141. Under such circumstances, Judge Touhey found, the debtor retained as of the filing date an equitable interest in the fee.

In *In re Oliver's Stores, Inc.*, 79 B.R. 588 (Bankr. D.N.J. 1987), Judge Touhey rejected a petition by counsel and an accounting firm representing an unsecured creditors' committee in a Chapter 11 case for authority to represent individual committee members in

a negligent auditing action against the Chapter 11 debtor's former accounting firm. In such an action, the debtor's former accounting firm could seek, under New Jersey law, indemnification or contribution from the debtor and its culpable officers or employees. *See id.* at 592-93. If so, Judge Touhey found, the committee's counsel and accounting firm would find themselves in the position of attempting to recover the same pool of damages for both of their clients, and hence, representing separate, adverse interests. *See id.* at 596-97.

Finally, in *In re Taylor*, 91 B.R. 302 (Bankr. D.N.J. 1988), *aff'd*, 103 B.R. 511 (D.N.J. 1989), *aff'd in part, appeal dismissed in part, Delightful Music Ltd. v. Taylor*, 913 F.3d 102 (3d Cir. 1990), Judge Touhey held that James Taylor, previously engaged as lead singer and a principal member of the recording artist group known professionally as "Kool And The Gang," could reject a contract under which he had obligated himself to perform recording artist services for Polygram Records, Inc. In determining that the contract constituted an "executory contract" for the purposes of the Bankruptcy Code, and concomitantly, that the debtor possessed the right to reject the contract, Judge Touhey observed that "[t]he debtor's ostensible purpose in rejecting the Polygram contract is that he may enter into a new recording contract with a subsequent corporation and thus proceed with his life and obtain what the debtor asserts to be his constitutional right for a fresh start." *See id.* at 311. Judge Touhey noted also that: (i) the debtor sought to relieve his estate of a burdensome contract; and (ii) the debtor would possess, pursuant to the rejection, the ability to seek a determination of the amount of his remaining obligations to Polygram and a determination of the treatment of Polygram's claim in a Chapter 11 plan. *See id.*

These and other decisions manifest Judge Touhey's supreme command of the governing law and seeming innate sense for fairness and justice. For such qualities, he will be appreciated. □

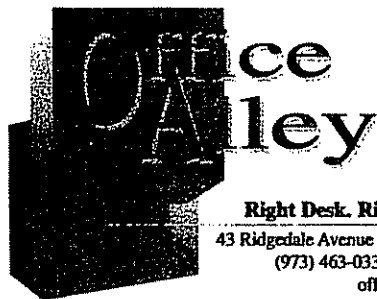
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