

VIRGINIA Lawyers Weekly

Virginia attorneys cool to bankruptcy venue changes

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The bill 'will prevent big companies from cherry-picking courts that they think will rule in their favor,' U.S. Sen. Elizabeth Warren said in introducing the measure.

Getting businesses to file their Chapter 11 cases closer to home seems like a good idea, which is why some bankruptcy attorneys elsewhere in the country are hoping Congress enacts bipartisan legislation intended to cut down on forum-shopping.

But bankruptcy practitioners in Virginia are apprehensive and worry the legislation will lead to more cases being litigated outside of the commonwealth.

Earlier this year, U.S. Sens. Elizabeth Warren, D-Massachusetts, and John Cornyn, R-Texas, introduced the Bankruptcy Venue Reform Act of 2021, which requires companies to file their Chapter 11 cases in their home state or the state where they have significant assets.

"This bipartisan bill will prevent big companies from cherry-picking courts that they think will rule in their favor," Warren said in introducing the measure.

The Senate bill, S. 2827, mirrors H.R. 4193, a measure introduced on June 28 in the House by Rep. Zoe Lofgren, D-California, and Rep. Ken Buck, R-Colorado.

In 2018, Warren introduced a similar bipartisan bill that languished in committee before dying a quiet death without ever receiving a vote.

According to Boston mediator and retired U.S. Bankruptcy Judge Joan N. Feeney, the Warren bill addresses a serious problem that has only grown "much worse" in recent years.

"It has evolved from forum-shopping to cherry-picking particular judges," Feeney said.

But Richmond bankruptcy attorney Ronald Page disagreed, suggesting the bill may be unnecessary.

"The act is trying to correct a problem I'm not even sure exists," he said. "It imagines these New York and Chicago attorneys trying to find a venue to give them a desired outcome, and I'm not sure that's how Richmond works."

AGs weigh in

On Nov. 9, 43 attorneys general signed a letter of support for the "virtually identical" S. 2827 and H.R. 4193.

The bipartisan letter submitted to congressional leaders by the National Association of Attorneys General made the argument that by "ensuring that debtors whose operations have created adverse impacts on their neighbors are called to account in proximity to those same neighbors, H.R. 4193 and S. 2827 will greatly limit forum shopping while helping consumers and many other parties, large and small alike — including creditors, workers, retirees, shareholders, and small business vendors — to represent themselves without undue burden."

But Virginia Attorney General Mark Herring was not among the attorneys general who signed on to the letter submitted by the NAAG. His communications office did not respond to a request for comment by press time.

Under the current venue provision of the Bankruptcy Code, 28 U.S.C. §1408, a Chapter 11 case generally may be commenced in the District Court for the district "in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the [180] days immediately preceding such commencement."

The statute also affords debtors the option of filing in a district in which there is a pending Chapter 11 case "concerning such person's affiliate, general partner, or partnership."

Warren's bill seeks to prevent forum shopping by requiring: (1) individual debtors to file for bankruptcy in the district where their domicile, residence or principal assets in the U.S. is located; and (2) corporate debtors to file for bankruptcy in the district where their principal assets or "principal place of business" in the U.S. is located.

The bill would further prohibit corporate debtors from filing simply on the basis of their state of incorporation and from filing in another district simply because an affiliate of the debtor has filed for bankruptcy in that district.

The view in Virginia

In recent years, a handful of bankruptcy courts have become perceived as preferred forums for corporate bankruptcies. These so-called "magnet districts" include the District of Delaware, the Southern District of New York, the Eastern District of Virginia, and the Southern District of Texas, where two bankruptcy judges have garnered a reputation for handling complex cases with assembly-line efficiency.

Page said that the reason that the Eastern District of Virginia has become a desirable venue for these types of cases is due to "the incredible legal acumen of the judges."

"They are getting it right, they are going by the book, and they do a very good job at applying law and finding results," he said.

Washington, D.C., attorney Dylan Trache, who chairs the Virginia State Bar Bankruptcy Law section, echoed Page's sentiment.



"We have good judges, and because they have handled several cases now, there's more certainty in some of the rulings that are going to come down during the course of the case," Trache said.

The Bankruptcy Law Section Board of Governors for the Virginia State Bar does not have an official position on the legislation, but Page and Trache both said that it would likely not benefit local practitioners.

"Virginia used to lose a lot of cases to other jurisdictions such as New York and Delaware," Trache said. "If the proposed legislation were adopted, we might lose more cases than we'd gain."

Likelihood of passage?

Boston bankruptcy attorney Kathleen R. Cruickshank has her doubts that this iteration of bankruptcy reform will succeed when other efforts have fallen short.

"Part of the reason I question whether this bill will pass is that it doesn't seem Congress can get much done," she said.

Trache said that regardless of whether they believe the legislation will pass, bankruptcy practitioners in Virginia should remain informed on the issue.



"It seems like venue reform has often been raised and never really gone anywhere."

– Dylan Trache

"It seems like venue reform has often been raised and never really gone anywhere," he said. "I don't know if it's going to be any different this time, but we have to just keep our eye on the ball."

According to Cruickshank, one stumbling block to reform in the past has been the chair of the House Judiciary Committee, Jerrold Nadler. The congressman's district includes parts of Brooklyn and Manhattan, so Nadler has always had a vested interest in protecting the local bankruptcy bar and its magnet court.

However, according to Cruickshank, the Southern District has been losing some of its luster as a forum of choice in the eyes of corporate debtors, meaning Nadler might now be more amenable to facilitating reform that would benefit the country at large.

Even if the bill makes it through Congress, Trache expressed doubts that President Joe Biden, a former six-term Delaware senator, would sign it into law.

"I would be surprised if he would actually sign a venue bill," said Trache. "That is just my best guess, because Delaware is probably the favorite bankruptcy venue still."

But Feeney disagreed, predicting that Biden will not stand in the way just because of his Delaware ties.

"If Congress passes these laws to correct abuses, then I don't see how he could not sign them [into law]," she said.

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