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# Bankruptcy Venue Reform Critics Question Need For New Bill

By **Alex Wolf**

Law360, New York (January 10, 2018, 8:29 PM EST) -- The motivation behind a bipartisan effort in Congress to reform bankruptcy laws by forcing companies to file their cases in the state where they conduct most of their business is misguided, according to some experts who say that longstanding forum selection rules actually benefit both debtors and stakeholders.

A bill sponsored by Sens. John Cornyn, R-Texas, and Elizabeth Warren, D-Mass., intended to prevent companies from engaging in "forum shopping" when they file for bankruptcy was **unveiled Monday**. According to the bill's proponents, the Bankruptcy Venue Reform Act of 2017 would help ensure that debtors are held accountable to "small businesses, employees, retirees" and other creditors and allow those stakeholders to "fully participate in cases that will have tremendous impacts on their lives."

But while proponents of the bill say change is needed to prevent corporate debtors from cherry-picking venues like Delaware or the Southern District of New York to advance their own interests without concern for underrepresented creditors, a contingent of practitioners say the system is already set up to maximize the chances for mutually successful reorganizations and there is simply no need to disturb the status quo.

"It might be a little bit of a solution in search of a problem because the solution is already available," Saul Ewing Arnstein & Lehr LLP partner Sharon Levine said.

The bill would require corporate debtors to file for bankruptcy in the district where their "principal assets or principal place of business" in the U.S. is, ending a long-standing practice of allowing companies to file wherever they're incorporated or wherever a subsidiary is located.

According to Levine and others, this change would be painful not only for debtors but also for stakeholders because bankruptcy filers often choose venues based on the bench's experience and track record handling particular issues that are bound to arise in particular cases.

"The idea of promoting certainty and predictability is not necessarily a bad thing for individual creditors even though it might be viewed as a good thing for the debtors," Levine said.

And all parties benefit when a corporate debtor can choose a venue not only for a court's ability to sort through complex issues, said Ted Gavin of corporate restructuring firm Gavin Solmonese LLC, but also for its application of circuit case law, calling that ability to anticipate case outcomes "an incredibly important tool." The proposed legislation would likely hurt employees, whose concerns in a bankruptcy case are often addressed at the very beginning, by limiting the debtor's tools to reorganize, he said.

"I don't know why on earth any person would strip that tool away from people trying to preserve value and keep jobs," he said. "Simply saying that 'we're going to make sure people file close to their headquarters' is meaningless."

The call for venue reform has come up before. In fact, Cornyn, who vied to have Enron Corp.'s Chapter 11 case transferred from New York to Texas when he was the Lone Star State's attorney general, introduced a similar bill in 2005 that never advanced out of committee. Another failed effort

was launched in the House in 2011.

Those who want to change the forum selection policy contend that it is fundamentally unjust to let one side of a bankruptcy case choose where the proceedings take place and what law will be applied.

Former Bankruptcy Judge Steven Rhodes, who presided over the city of Detroit's 2013 municipal restructuring case, told Law360 a company should not be allowed to choose a court venue without regard to its creditors.

"Access is not simply a matter of thinking about those parties that want to be heard," said Rhodes, now an alternative dispute resolution mediator. "There are in these cases many, many parties who simply want to sit in and watch and witness the proceedings so that they themselves can be satisfied about the fairness and legitimacy of the process."

UCLA School of Law professor Lynn LoPucki, who in the 1980s led a study funded by the National Science Foundation of large public company bankruptcies, said the system not only creates an imbalance between debtors and stakeholders who lack sway, but also puts a perverse pressure on judges to attract cases to their courts.

"It's feeding a corrupt culture in the bankruptcy courts," he said. "That culture is the idea that only the big players — the debtor, the DIP lender, the creditors' committee — are the only ones that count. Everybody else is a meddler."

LoPucki acknowledges that bankruptcy judges in the districts replete with large Chapter 11 cases have gained the expertise to handle complex matters, but he believes changes are needed to fix a perceived competition for cases in New York and Delaware.

Opponents of the venue bill, meanwhile, say creditors already have protections in place to ensure they don't lose access to the courts. Levine noted that debtor-funded committees exist to represent the interests of unsecured creditors, and often parties that can't physically attend a hearing are allowed to phone in.

And while advances in technology are making it easier for creditors to participate in a bankruptcy case, it's also becoming increasingly difficult to single out a particular district as the unequivocal home of a large debtor's business when trade creditors and employees can be scattered across the globe, said Robert Gayda of Seward & Kissel LLP.

"It's difficult to predetermine what jurisdiction is best to maximize unsecured creditors' participation, which is usually the stated goal of venue reform legislation," he said. "The concerns that proponents of reform articulate are becoming less and less of an issue as time progresses, and I do think there are protections currently in place that address those concerns."

Gayda also noted that large cases are increasingly being filed in Houston, Richmond and other districts outside Manhattan and Wilmington.

Plus, opponents of the bill say motions to transfer venue are often granted, pointing to recent examples in the Chapter 11 cases for Caesars Entertainment Operating Co., which was transferred from Delaware to Illinois, and Patriot Coal, which was sent from New York to Missouri.

As far as employees of a bankrupt company are concerned, their wages and benefits are often preserved under a debtor's first-day motions, and their state law rights remain protected under the Bankruptcy Code no matter where the case is filed, Gavin said.

Concluding that employees already have sufficient protections in place, Gavin argued that Cornyn and Warren's bill is premised on "an abject lie" and is more so a product of the lawmakers' ignorance of how complex Chapter 11 reorganizations work and external pressure by bankruptcy professionals based outside Delaware and New York City. Groups endorsing the bill include the Texas Bankruptcy Bar Association and the Boston Bar Association.

"This isn't about employees," Gavin said. "This is about bankruptcy lawyers in districts that don't get the cases that they think they should wishing that they had better income."

As in years past, the effort is being met with fierce resistance on Capitol Hill, particularly by Delaware's congressional delegation. Sens. Tom Carper and Chris Coons and Rep. Lisa Blunt Rochester, all Democrats representing Delaware, joined with Democratic Gov. John Carney in a statement Monday denouncing the proposed measures as a restriction on business and a drag on the U.S. economy.

"Many American companies, large and small, choose to incorporate in Delaware because of the expertise and experience of our judges, attorneys, and business leaders," they said. "Denying American businesses the ability to file for bankruptcy in the courts of their choice would not only hurt Delaware's economy but also hurt businesses of all sizes and the national economy as a whole."

--Editing by Brian Baresch and Breda Lund.

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