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The Chapter 11 Bankruptcy Venue Reform Act: A Change of Scenery for Large Corporate Debtors?

The House Judiciary Committee recently heard testimony on the benefits and pitfalls of proposed legislation that would change bankruptcy venue rules by imposing limitations on where corporations may file for bankruptcy protection. The hearing came in the wake of a statement by Judiciary Committee Chairman Lamar Smith, R-Texas, in which he asked how Enron had been able to file its bankruptcy case in Manhattan considering that Enron was based in, and had substantially all of its assets and operations in, Texas. According to remarks made by University of North Carolina law professor Melissa B. Jacoby, approximately 70 percent of the 200 plus large public companies that have filed for Chapter 11 bankruptcy since 2005 filed their petitions in either Delaware or New York City.

In July, Chairman Smith and the Committee's top Democrat, Rep. John Conyers Jr., D-Micha., introduced a bill known as the *Chapter 11 Bankruptcy Venue Reform Act of 2011*, (HR 2533) in response to the perceived trend of "forum shopping" by parent corporations of corporate bankruptcy debtors. Proponents of the bill argue that a corporate parent should not be permitted to file for bankruptcy in a jurisdiction where it has no ties. Having been introduced and referred to committee for hearing, this bill is in the second stage of the legislative process. If the bill survives the committee reporting process, the next step will be consideration by the entire House of Representatives.

Under the present venue rules, corporations are permitted to file for Chapter 11 in one of three places: the judicial district where the entity is incorporated; the judicial district where its principal assets are located; or the judicial district in which the corporate headquarters are located. An ancillary provision permits a corporate parent that would otherwise be required to file elsewhere to file its case in the same district where an affiliate's case is already pending. A tactic used by many large corporations is to cause a qualifying corporate affiliate of the larger parent company to file for bankruptcy in one jurisdiction—usually New York or Delaware—to satisfy the venue requirements. Shortly (or immediately) after the first company files for bankruptcy, the parent company follows suit, thereby "bootstrapping" its own venue.

The proposed bill would curtail this practice by requiring corporate debtors to file bankruptcy only where they operate or have their principal assets. While the bill still permits filing in jurisdictions where affiliated cases are pending, it only allows corporate parents to "follow" if the affiliate directly or indirectly owns, controls or holds more than 50 percent of the voting securities of the parent company. Proponents of the bill argue that requiring companies to file for bankruptcy in the jurisdiction in which the company operates or has its principal assets allows the major stakeholders—the company's employees and vendors—to more meaningfully participate in the restructuring process. They also argue that the proposed bill would prevent litigants from shopping for a venue with case-favorable judicial precedent, often to the detriment of their stakeholders.

Opponents of the bill argue that forum shopping should be permitted because the judiciary and practitioners in jurisdictions like New York and Delaware are far more experienced in restructuring matters and are better able to serve their clients. They also argue, that administrative expenses would increase as a result. Others argue that the proposed change is unnecessary because present venue rules contain a provision allowing the court to transfer a case to a different venue in the interests of justice or the convenience of the parties.

Prospects for Passage

HR 2533 is a rare example of bi-partisanship in a Congress where intense partisanship has resulted in very few major pieces of legislation becoming law. In addition to Chairman Smith

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and Rep. Conyers, both the Chairman and top Democrat on the Subcommittee with jurisdiction over bankruptcy, Rep. Howard Coble, R-NC and Rep. Steve Cohen, D-TN, respectively, have co-sponsored the bill. Generally, when the "big four" on a Congressional committee lend their support to a bill, it means that most, if not all, of the differences between the parties that may otherwise delay or scuttle legislation have been resolved and the bill's chances of passing one or both chambers of Congress have improved dramatically. Given that the changes included in HR 2533 have united the leadership of the Judiciary Committee, it is likely to pass the Committee fairly easily before being considered by the full House of Representatives.

This does not mean, however, that it is guaranteed to pass Congress easily. The House voting schedule is controlled by Speaker Boehner and his leadership team, who will have to review the legislation and weigh in with their views before scheduling a vote. In addition, if passed by the House, the bill will also have to be considered by the Senate, which does not have a similar bill of its own and generally operates at a slower pace than the House. Given the major changes to existing law contained in the bill, the Senate Judiciary Committee will likely want to hold its own hearings after the House completes its work and give members a chance to share their views. The Senate's rules for considering legislation also allow one member to block a bill from advancing to a vote unless the bill's proponents have secured 60 votes to overcome this type of challenge. Since HR 2533 has not yet passed the House Judiciary Committee or the full House, it's hard to know at the present moment how substantial its support will be in the Senate or whether opponents of the bill will be able to convince a Senator to block it.

At the same time, the bill contains changes that appeal to Democrats, who still control the Senate, especially the elimination of some types of "forum shopping," which may provide more opportunities for workers impacted by a corporate bankruptcy to play a role in the subsequent judicial proceedings. Moreover, Chairman Smith is a well respected policymaker and has the distinction of sheparding through Congress one of the only major pieces of legislation to become law this year, the America Invents Act, which was also a bi-partisan effort. Smith and Senate Judiciary Committee Chairman Patrick Leahy, D-VT, worked closely on this legislation and would also have to work together on HR 2533 assuming it reaches that point in the legislative process.

The *Chapter 11 Bankruptcy Venue Reform Act of 2011* is still in the early stages of consideration by Congress. The Arent Fox Bankruptcy and Financial Restructuring and Government Relations practice groups will continue to monitor developments regarding this legislation to determine its impact upon our clients. For further information regarding this legislation, please contact the Arent Fox attorney with whom you regularly work or one of the individuals listed below:

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