Critical Issues List 2022
Creditors' Rights Section for
Commercial Law League of America

Introduction

This paper contains recommendations from the Creditors' Rights Section for the Commercial Law League of America for proposed legislative and regulatory actions. The proposals are not meant to be definitive positions, but rather are designed to identify issues and areas of concern for further development and appropriate legislative action.

THE CRITICAL ISSUES

1. NO THIRD PARTY RELEASES IN BANKRUPTCY COURT

   In the majority jurisdictions, courts have allowed Chapter 11 debtors to include both consensual and nonconsensual third-party releases that preclude certain non-debtors from pursuing claims against other non-debtors as part of a restructuring deal, despite the fact that there is no statutory authority giving judges the power to issue such releases, which modifies a noneditor's property interest in a claim against another nondebt or. CRS should work with the Bankruptcy Section to lobby in favor of amending the Code to clarify that third party releases are not authorized under the existing Code, which is the law in the Ninth and Tenth Circuit Courts of Appeal.

   Even in the Second Circuit, which has allowed such releases, the court recognized that:

   > "[A] nondebtor release is a device that lends itself to abuse. By it, a nondebt or can shield itself from liability to third parties. In form, it is a release; in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code. The potential for abuse is heightened when releases afford blanket immunity."

   Thus, the CRS should lobby for a complete ban on third party releases given that there is no authority for such releases.

   If, however, the bankruptcy section supports third party releases, then the two sections can work towards a joint proposal that limits third party releases to large tort cases and mandates that nondebt or releases must require the consent of every party granting the release (*i.e.*, prohibit courts from permitting debtors to treat creditor votes accepting a Chapter 11 plan as a sufficient showing of consent to the plan's release provisions) and

further mandate that claimants affirmatively "opt in" to the releases by returning a form/ballot that evidences their consent. This would effectively put a ban on nonconsensual releases, including exculpation clauses.

Included in this effort, should be lobbying to prohibit plan provisions that condition a claimant's plan treatment on whether it consents to plan releases and foreclose on the practice of conditioning an enhanced recovery on the creditor's affirmative consent to a release.

2. UCC ARTICLE 2 CHANGES

The UCC is a law that gets enacted by states to deal with commercial transactions and address contract formation and interpretation, and to set forth remedies for breach. CRS can use the Model UCC definitions so that commercial business transactions are protected from consumer protection type laws.

3. DEFINING HARDSHIP FOR STUDENT DEBTOR UNDER 11 USC 523(A)(8)

This is a follow up to the 2019 effort to define hardship. This can be another joint effort with the Bankruptcy Section

4. UNIFORM FOREIGN COUNTRY MONEY JUDGMENTS ACT

The UCC is a law that gets enacted by states to deal with foreign transactions and address judgment enforcement. CRS can use the Model UCC to lobby in favor of protecting business transactions from consumer protection type laws. It also can be used to lobby in favor of the two convention provisions below.

5. HAGUE CHOICE OF COURT AGREEMENTS CONVENTION

The Hague choice of court convention is an international treaty concluded within the Hague Conference on Private International Law. It ensures the effectiveness of choice of court agreements (forum selection clauses) made between parties to international commercial contracts. The European Union, Denmark, Mexico and Singapore are parties; and, China, the United States and Ukraine have signed it though not yet ratified it. The Hague Convention on Choice of Court Agreements aims to create a system of recognition of court decisions with the same level of predictability and enforceability as arbitral awards under the New York Convention.

"Where parties have agreed to resolve their commercial disputes in a specific national court, the Convention provides that such agreement will be enforced in every signatory state, other signatory states must abstain from asserting jurisdiction over the matter, and a

judgment subsequently rendered by the chosen court will be recognized in other signatory states. . . . This would be an important first step in placing judgments on an equal footing with arbitral awards when it comes to worldwide enforcement."

Most importantly, it would provide an alternative to international arbitration mandates in commercial agreements since most "[c]contracting parties regularly choose New York, London, or Singapore as the forum for dispute resolution, and having judgments from those places reliably enforced throughout the United States and Europe would be a significant and welcomed development. The Convention is also under consideration in Argentina, Australia, Canada, New Zealand, Paraguay, the Russian Federation, and Turkey. This could be the start of a truly global regime. While it might indeed be too soon to predict the demise of arbitration as the preferred means of international dispute resolution, the Convention is certainly a first step toward parity between these often competing modes of dispute resolution."

6. INTER-AMERICAN CONVENTION ON JURISDICTION IN THE INTERNATIONAL SPHERE FOR THE EXTRATERRITORIAL VALIDITY OF FOREIGN JUDGMENTS

Currently, there is no federal law that governs the recognition of foreign judgments. The procedure for the recognition and enforcement of foreign judgments is on a state-by-state basis and depends (which varies depending on whether and what Uniform Code was enacted). The substantive law in the federal courts is derived from the U.S. Supreme Court decision in *Hilton v. Guyot* (1895).

The Judgments Convention seeks to facilitate international trade by easing the recognition and enforcement of foreign civil judgments across national borders. It does so by providing a set of rules under which civil and commercial judgments can be recognized and applies to all civil and commercial judgments, but excludes certain judgment such as family matters, defamation and privacy, intellectual property, and transboundary marine pollution.

The benefits to U.S. litigants will be significant as U.S. judgment creditors will be able to recognize and enforce their judgments in other countries under a simplified and streamlined procedure. In fact, "the Convention could be "*a gamechanger for cross-border dispute settlement*, much like the New York Convention has been for the widespread adoption of arbitral awards" as a judgment is only as valuable as the judgment creditor's ability to have it recognized and enforced abroad in the event the judgment debtor or its assets are abroad.

This also would open the door to allowing international transactions to avoid the cost of international arbitration since this would place judgment on the same level as international arbitration awards.

7. OPPOSITION TO H.R. 6814

On February 22, 2022, Rep. Al Lawson [D-Fla] introduced Bill H.R. 6814 to extend the consumer protections provided under the Fair Debt Collection Practices Act, 15 USC1962 et. seq. ("FDCPA") to any business that incurs a debt less than $5,000,000.00, regardless of the size of the company. Under this proposed bill, the term "debt" would be expanded to include "any obligation or alleged obligation to pay money arising out of a transaction" and would define "small business debt" as "any non-equity obligation or alleged obligation of a partnership, corporation, trust, estate, cooperative, association, government, or governmental subdivision or agency, or other entity that is less than$5,000,000." The CLLA opposes this bill because it does not protect small businesses since it extends consumer protections based on the size of the debt, not the size of the company, would harm small businesses' ability to collect money due them, and would impact their ability to obtain credit.