



Legislative Forum

May 15, 2024

130th CLLA National Conference
Chicago

BANKRUPTCY VENUE REFORM

1) Amend the Bankruptcy Code

On February 14, 2023, Representatives Lofgren (D-CA) and Buck (R-CO) introduced the Bankruptcy Venue Reform Act (H.R. 1017). Reintroduction of a companion bankruptcy venue reform bill in the Senate, based on S. 2827 from the 117th Congress is expected soon.¹ S. 2827 was introduced by Senators Cornyn (R-TX) and Warren (D-MA) in September of 2021. These bipartisan bills required Chapter 11 cases to stay local by requiring corporate debtors to file where they have their principal assets or principal place of business. If passed and enacted, companies will have to file bankruptcy where they conduct their business. Debtors will no longer be able to unilaterally choose the jurisdiction or the judge they deem friendly. Instead, competent bankruptcy judges assigned randomly would oversee the reorganization of companies that are based in their own communities. A copy of the HR 1017 (118th Congress) and S. 2827 (117th Congress) can be found at:

<https://www.congress.gov/bill/118th-congress/house-bill/1017>
<https://www.congress.gov/117/bills/s2827/BILLS-117s2827is.pdf>

a. Purdue Pharma

In a recent development, on May 30, 2023 the United States Court of Appeals for the Second Circuit ruled that a Chapter 11 reorganization plan may include nonconsensual third-party releases of direct claims against non-debtors widening the circuit split on this controversial issue. In so holding, the Court of Appeals reversed a decision of the United States District Court for the Southern District of New York which had declared that such releases were not statutorily authorized, and had overruled the Bankruptcy Court's confirmation a reorganization plan with the releases. The Second Circuit reasoned that several sections of the Bankruptcy Code supported the jurisdiction and authority of the bankruptcy court to approve third party releases of the personal liabilities of directors, officers, shareholders of the Debtor who owned the privately

¹ On April 10, 2024, Senator McConnell introduced S. 4095 that incorporated the provisions of H.R. 1017. The text of the bill can be viewed at: <https://www.congress.gov/bill/118th-congress/senate-bill/4095/text?s=1&r=3&q=%7B%22search%22%3A%22S.+4095%22%7D>



held company for their role in improperly marketing and selling opioids. The corporate Debtor and their owners had faced thousands of lawsuits by individual victims of opioids and many states of the United States but only the corporation, not the owner family members had filed for bankruptcy; the plan of the Debtor released the family member owners from all liabilities in connection with the Debtor's debts in exchange for a voluntary contribution of approximately \$6 billion; and the family members owners retained over \$11 billion in distributions from the Debtor. *In re Purdue Pharma L.P.*, 69 F.4th 45 (2nd Cir. 2023).

The Circuits are starkly divided on this important issue. The Fifth, Ninth and Tenth Circuits have held that permanent injunctions that effectively discharge the debts of nondebtors are beyond the power of the bankruptcy courts. Whereas the Fourth, Sixth, Third, Seventh and now again, the Second Circuit are less strict and allow for the possibility of nonconsensual third-party releases in a confirmed Chapter 11 plan of reorganization. See, *First Energy Sols. Corp.*, 606 B.R. 720, 733-734 (Bankr. N.D. Ohio 2019). The result of the Second Circuit's decision in *Purdue Pharma*, will likely encourage more forum shopping to the courts that allow for nonconsensual releases, and further undermining public confidence in the bankruptcy system via venue manipulation, accelerating the disenfranchisement of creditors, employees and other parties and impairing the development of bankruptcy jurisprudence by concentrating cases into these districts.

Seeing the continuing degradation and threat to the bankruptcy system, on July 7, 2023 the Solicitor General filed a petition for certiorari asking the US Supreme Court to review the Second Circuit's decision in *Purdue Pharma*. Certiorari was granted and the case has been fully briefed, argued and awaiting the US Supreme Court's decision. *William K. Harrington vs. Purdue Pharma L.P. et al.*, U.S. Supreme Court, No. 23-124 (2023). The Commercial Law League and the Venue Group filed an amicus curiae brief arguing how the split in the circuits help fuel forum shopping, especially in the bankruptcy courts. A copy of the amicus brief is available for download at:

<https://clla.org/venue-reform-workroom/>

2) **Elimination of Local Small Complex Wheels**

On November 1, 2023 the CLLA wrote a letter to the Honorable Eduardo V. Rodriguez, Chief Judge, US Bankruptcy Court, Southern District of Texas [attached] joining other groups in encouraging the Court to eliminate their current system of assigning complex Chapter 11 cases to a two-judge panel. We believe that system promotes forum shopping but also its pernicious



corollary – judge shopping. A better approach would be a true random assignment of such cases that allows all judges in a District the opportunity to preside over the case. For an example of such placement, see the US Bankruptcy Court, Central District of California at:

<https://www.cacb.uscourts.gov/sites/cacb/files/documents/general-orders/GO%2023-02.pdf>

3) National Bankruptcy Rule Revision

We are also developing a revised Federal Rules of Bankruptcy Procedure that would help to a) reduce venue shopping, b) reduce judge picking, c) increase uniformity and predictability in venue choices, d) these goals might be accomplished by giving bankruptcy judges authority to redress venue manipulation and requiring court action within 28 days after case commencement. Amendments to Rules 1007, 1014 and 1412 are being considered.