A REVIEW OF THE CLLA'S HILL DAY ACTIVITIES

May 4, 2019
4:15- 5:15 p.m.
Room: Gatlin A1

Rosen Shingle Creek Orlando

Presented by

David Goch

Peter Califano

Reuel Ash

Daniel Kerrick

I.

Overview and Lobbying

Commercial Law League of America: Capitol Hill Day 2019

David Lieberman
Webster, Chamberlain & Bean, LLP
February 24, 2019

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Agenda

1. CLLA Hill Day 2019 Goals.
2. What a typical Hill meeting is like.
   A. For both Members, Senators, and staff.
3. Meeting Do's and Don'ts.
4. Quick recap of legislative process.
   A. Dave's deep dive is printed out for you.

Capitol Hill Day Goals

- Talk to as many Members of Congress, Senators, and staff as possible.
  - The more, the better!
- Educate.
  - For the most part, you will have to be the teacher.
- Garner support for the legislation.
  - Sponsors, cosponsors, letters of support.

Typical Meeting: Member or Senator

- The meeting will last 15-20 minutes at most.
- There usually will be at least one or two policy staffers attending the meeting.
- Speak directly to the Member or Senator, while acknowledging the staff as appropriate.
- Don’t be shy!

Typical Meeting: Member or Senator

- Important to give background on yourself first.
  - The Member usually cares because you are a constituent, not because of the bill's policy.
- Then, briefly explain the issue.
  - Two or three overarching policy goals; try not to go into too much detail.
- Finish with an "ask": cosponsorship, letter of support etc.

Typical Meeting: Staff

- The meeting will last 15-30 minutes.
- The staffer's title will usually be Legislative Assistant or Legislative Counsel.
  - There will be no Member present.
- Do not get dissuaded if the staffer you are meeting with is a Legislative Correspondent.
  - Lower in rank than a Legislative Assistant or Counsel.

Typical Meeting: Staff

- This is the meeting to get into any details.
- However, you still need to treat the meeting as if the staffer knows nothing.
  - If they are familiar with the bill, they will tell you.
- The staffer will ask good, direct questions.
  - Answer as best you can but its okay to say “I don’t know and I’ll get back to you.”

Meeting Do’s and Don'ts

Do

- Show up on time.
- Be the teacher.
- Have business cards ready.
- Be flexible.
- Be respectful but remember, they work for you!

Don’t

- Be late.
- Be disappointed if you do not get to meet with the person you want.
- Assume that they know the issue.
- Leave without asking!

Legislative Process: Congress

- Bill introduction.
- Committee hearing and markup.
- Committee passage.
- Floor time.
- Passage on the Floor.
- If passed, the bill goes to President; if fails, it is recommitted to the committee of jurisdiction.

Legislative Process: Executive

- The President can either sign, veto, or “pocket veto” a bill.
  - A pocket veto allows a President to exercise power over a bill by taking no action (instead of affirmatively vetoing it).
- The vast majority of bills that pass Congress are signed by the President.
  - For example, President Obama only vetoed 12 bills.

Final Thoughts

- What you are doing works!
  - One of the best ways to move the needle on Capitol Hill is by having fly-ins.
- Great way to connect with your federal officials.
- Connecting with staff is (sometimes) just as good as Members and Senators.
- When you are at a meeting, remember the floor is yours!

QUESTIONS?

THANK YOU!

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II.

Bankruptcy Venue Reform

CLLA HILL DAY

February 25, 2019

BANKRUPTCY VENUE REFORM

1. PROPOSAL

Last Congress, Senators John Cornyn (R-TX) and Elizabeth Warren (D-MA) introduced a bipartisan bankruptcy venue reform bill as S. 2282 entitled the Bankruptcy Venue Reform Act of 2018 to rebalance where commercial Chapter 11 bankruptcy cases are commenced. See **Exhibit A** for a copy. The proposed law eliminates the place of incorporation in favor of filing where the debtor's principal place of business or principal assets are located. It will also eliminate the affiliate-filing loophole. The result of this effort will make it more likely that local bankruptcy cases will be decided at home. Plans are underway to reintroduce the legislation, along with a companion House bill in the 116th Session.

2. BACKGROUND

A 2015 GAO Report on Corporate Bankruptcy – Stakeholders Have Mixed Views on Attorneys; Fee Guidelines and Venue Selection for Large Chapter 11 Cases (GAO-15-839) confirmed that between 2010 and 2014 nearly 71% of large companies (assets and liabilities of $50 million or more) filed their chapter 11 cases in the District of Delaware or the Southern District of New York. (Id., p. 35). The GAO Report (p. 42) and an earlier academic study (Parikh 46 Conn. L.R. 159, 179 (2013)), although each using different samplings during different periods of time since 2007, found that approximately two-thirds of larger chapter 11 cases fled their headquarters state to seek bankruptcy protection. Our research tracked these same trends for the years from 2004 through 2016, and found that the overwhelming majority of forum-shopped cases filed in Delaware. This trend is not limited to large public companies. Almost a third of the 735 forum-shopped Delaware cases involved smaller businesses with less than $15 million in assets at the time of filing!

3. THE HUMAN TOLL AND IMPACT OF FORUM SHOPPING

When troubled companies flee their home states and seek bankruptcy protection in remote jurisdictions, trade creditors, employees, retirees and other parties are disenfranchised, public confidence in the bankruptcy system erodes and local interests are ignored. See **Exhibit B** for maps of *VeraSun Energy Corporation*, *Lily Robotics* and *Marsh Supermarkets* cases to illustrate the problem of filing a Chapter 11 bankruptcy case far away from where the debtor's business was conducted. In *Verasun*, farmers were forced to retain their own counsel and

appear individually over a thousand miles away in Delaware to defend their corn contracts. The solar company *Solyndra* fled California to file in Delaware leaving 1100 employees behind to fend for themselves after the company terminated them without warning. Midwestern-based *Marsh Supermarkets* ran from their employees and retirees in the Midwest to file in Delaware where the company had no nexus whatsoever. It left behind $80 million of unpaid severance and retirement benefits. The right under Title 28 to seek a transfer of venue after a bankruptcy filing proved to be a superficial remedy for the West Virginia coal miners when *Patriot Coal* fled north to file for bankruptcy protection in a jurisdiction where venue was not even proper. Although the miners eventually prevailed in their motion to transfer venue, it took many months and cost them millions in legal fees.

4. WHY VENUE REFORM IS NECESSARY

- The 1997 National Bankruptcy Review Commission recognized that forum shopping and the concentration of cases in Delaware made it more difficult for small creditors and employees to actively participate in a bankruptcy case. The mass concentration of chapter 11 cases far from a debtor's home state deprives local constituents of their due process and tilts the playing field toward financially sophisticated parties who regularly appear in large bankruptcy cases. The situation has continued to deteriorate over time, leading to a growing level of indifference among creditor, employee and retiree constituents unable to participate actively in a process that directly affects their interests.

- When a disproportionately high number of large and middle market companies flee primarily to Delaware to seek refuge from their creditors, the process appears to be subject to manipulation by large moneyed interests. In the Patriot Coal case it was noted by the press that "[l]enders and lawyers who get the big cases like taking their troubles to courts in New York and Delaware, which are convenient to their homes and offices and attuned to their concerns". Forum shopping to achieve desired outcomes directly threatens the integrity of the bankruptcy system by eroding public confidence and calling into question the fairness of a bankruptcy system that can be so easily manipulated.

- Retired Bankruptcy Judge Steven Rhodes (Bankr. E. D. Michigan) commented in the Wall Street Journal that the current venue law is "the single most significant source of injustice in chapter 11 bankruptcy cases." The National Association of Credit Managers recently asserted that venue shopping in bankruptcy cases "creates significant obstacles for trade creditors….and increases the cost of participation." Venue reform will put an end to the rampant forum shopping permitted under the current statutory regime.

- The consequences of a business bankruptcy are often most profound in the region and community in which the debtor's principal place of business or principal assets are located. The location of the bankruptcy case can have a tremendous impact on the local economy. Based on estimates from Bloomberg Businessweek (February 12, 2012), the flood of companies fleeing their home jurisdictions over the past 13 years has drained nearly $4 billion from local economies.

5. PARTIAL LIST OF SUPPORTING ORGANIZATIONS

Bankruptcy & Commercial Law Section of the Dallas Bar Association
Bar Association of San Francisco
Boston Bar Association
Chicago Bar Association
City of Berkeley
California Lawyers Association, Business Law Section
Commercial Law League of America
Illinois State Bar Association
Iowa Bankers Association
National Association of Attorneys General (pending)
National Association of Credit Managers
State Bar of Florida
State Bar of Indiana (Bankruptcy Section)
State Bar of Minnesota
State Bar of South Carolina
State Bar of Texas Bankruptcy Section
Tampa Bay Bar Association
Texas Hotel & Lodging Association
United Mine Workers of America

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EXHIBIT A

115TH CONGRESS
2D SESSION

S. 2282

To amend title 28, United States Code, to modify venue requirements relating to bankruptcy proceedings.

IN THE SENATE OF THE UNITED STATES

JANUARY 8, 2018

Mr. CORNYN (for himself and Ms. WARREN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 28, United States Code, to modify venue requirements relating to bankruptcy proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Bankruptcy Venue Reform Act of 2018".

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—Congress finds that—

(1) bankruptcy law provides a number of venue options for filing bankruptcy under chapter 11 of title 11, United States Code, including place of in-

corporation, principal place of business and assets, or where an affiliate has filed a case under chapter 11;

(2) the wide range of permissible bankruptcy venue options has led to an increase in companies filing for bankruptcy outside of their home States, or the district in which their principal place of business or principal assets are located, a practice known as forum shopping, and has resulted in a concentration of bankruptcy cases in a few districts;

(3) bankruptcy forum shopping prevents small businesses, employees, retirees, creditors, and other important stakeholders from fully participating in bankruptcy cases that will have tremendous impacts on their lives, communities, and local economies, and deprives district courts of the United States of the opportunity to contribute to the development of bankruptcy law in their jurisdictions; and

(4) reducing forum shopping and manipulation in the bankruptcy system will strengthen the integrity, build public confidence, and ensure fairness in the bankruptcy system.

(b) PURPOSE.—The purpose of this Act is to prevent the practice of forum shopping in cases filed under chapter 11 of title 11, United States Code.

SEC. 3. VENUE OF CASES UNDER TITLE 11.

Title 28, United States Code, is amended—

(1) by striking section 1408 and inserting the following:

"§ 1408. Venue of cases under title 11

"(a) DEFINITION.—In this section, the term 'principal place of business' means, with respect to a person or entity that is subject to the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o(d)), the address of the principal executive office of the person or entity as stated in the last annual report filed under that Act prior to the commencement of a case under title 11 by the person or entity, unless another address is shown to be the principal place of business by clear and convincing evidence.

"(b) VENUE.—Except as provided in section 1410, a case under title 11 may be commenced only in the district court for the district—

"(1) in which the domicile, residence, or principal assets in the United States of an individual who is the subject of the case have been located for the 180 days immediately preceding such commencement, or for a longer portion of the 180-day period than the domicile, residence, or principal assets in the United States of the individual were located in any other district;

"(2) in which the principal assets or principal place of business in the United States of a person or entity, other than an individual, that is the subject of the case have been located for the 180 days immediately preceding the commencement, or for a longer portion of the 180-day period than the principal place of business or principal assets in the United States of the person or entity were located in any other district; or

"(3) in which there is already pending a case under title 11 concerning an affiliate that directly or indirectly owns, controls, is the general partner, or holds 50 percent or more of the outstanding voting securities, of the person or entity that is the subject of the later filed case if the pending case was properly filed in that district under this section.

"(c) LIMITATIONS.—

"(1) IN GENERAL.—For the purposes of paragraphs (2) and (3) of subsection (b), no effect shall be given to a change in the ownership or control of a person or entity that is the subject of the case or its affiliate, or to a transfer of the principal assets or principal place of business of a person or entity that is the subject of the case or its affiliate to another district, that takes place—

"(A) within 1 year before the date on which the case is commenced; or

"(B) for the purpose of establishing venue.

"(2) PRINCIPAL ASSETS.—For the purposes of subsection (b)(2) and paragraph (1) of this subsection, principal assets do not include cash or cash equivalents.

"(d) BURDEN.—The person or entity that commences a case under title 11 shall bear the burden of establishing by clear and convincing evidence that venue is proper under this section."; and

(2) by striking section 1412 and inserting the following:

"§ 1412. Change of venue

"Notwithstanding that a case or proceeding under title 11 is filed in the correct division or district, a district court may nevertheless transfer a case or proceeding under title 11 to a district court for another district or division, in the interest of justice or for the convenience of the parties. If a case or proceeding under title 11 is filed in the wrong division or district, the district court shall transfer, dismiss the case or proceeding, or, if it be in the interest of justice, transfer the case or proceeding under title 11 to any district or division in which it could have been brought. The court shall enter an order on any

objection to or request to change venue of a case or proceeding under title 11 not later than 14 days after the filing of such objection or request.".

○

EXHIBIT B

VeraSun Energy Corporation Case Facts

Case no. 09-12606-BLS

Filed: October 31, 2008

Where Filed: United States Bankruptcy Court for the District of Delaware

Headquarters: Sioux Falls, SD

Corn Producers: 7,800 corn contract holders, over 6,000 from Iowa

Plants: 17 production facilities in eight states

Lily Robotics Case Facts

Case no. 17-10426-KJC

Filed: February 27, 2017

Where Filed: United States Bankruptcy Court for the District of Delaware

Headquarters and sole location: San Francisco, CA

Distance from Headquarters to Nearest Bankruptcy Court: Less than 5 miles

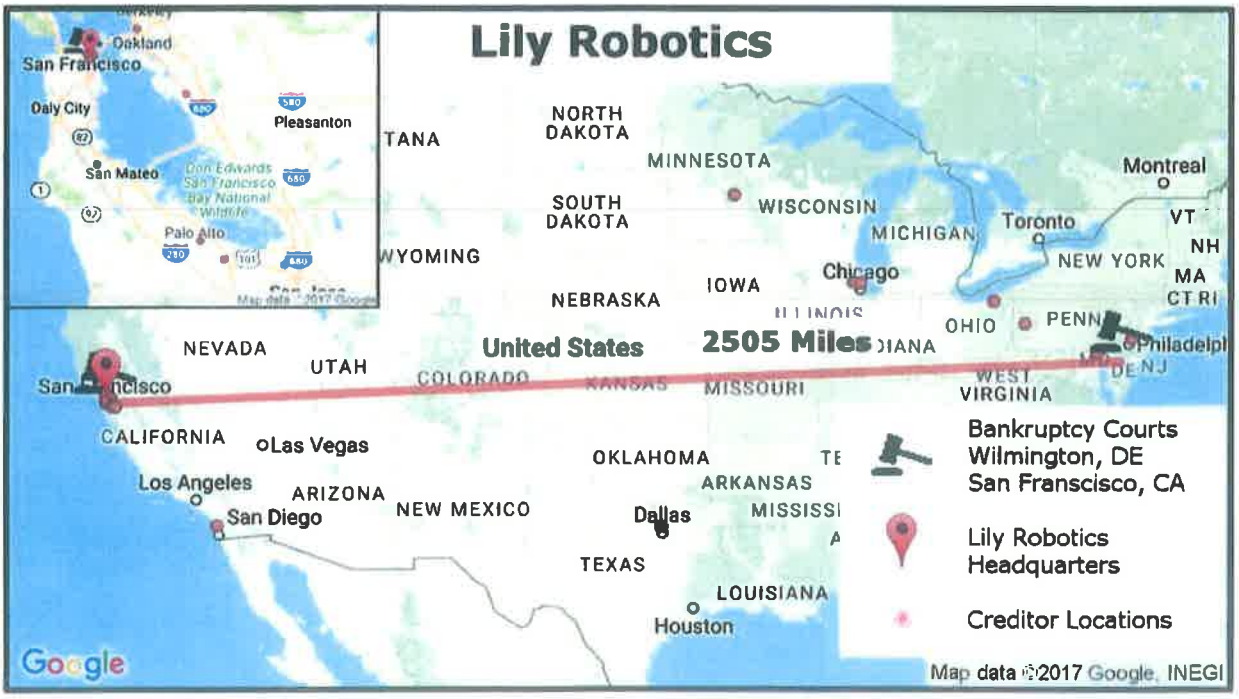
Subsidiaries/Affiliates: None

Assets: $32,995,584.66 including $25,660,972.52 cash and $4,274,323.73 receivables

Location of Creditors: 15 of the 30 largest unsecured creditors listed when petition was filed are from California.

Location of Equity Holders: 55 of the 71 equity holders are in California.

Addressees on Matrix: 16 of the 30 entries on the Consolidated Creditor Matrix are from California.



Marsh Supermarkets Case Facts

Case no. 17-11066-BLS

Filed: May 11, 2017

Where Filed: United States Bankruptcy Court for the District of Delaware

Headquarters: Indianapolis, IN

Employees: 4,400

Assets: 60 stores in Indiana and Ohio

Trade Payables: $30,000,000.00

Underfunded Pension: $21,750,000.00

Multiemployer Pension Plan Liability: $55,000,000.00

Location of Largest Unsecured Creditors:

State	Number	State	Number
CA	1	MI	1
Canada	1	MN	2
CT	1	NH	1
FL	1	NJ	1
GA	1	NY	1
IL	3	NC	4
IN	11	PA	1

Op-Ed: Bankruptcy Venue – a Time for Change

Op-Ed: Bankruptcy Venue – A Time for Change

By former American Airlines GC Gary Kennedy

(June 11) – In November 2011, American Airlines filed for bankruptcy. It was the largest aviation-related bankruptcy on record.

As general counsel of the company, I took advantage of broad venue selection rules under the bankruptcy code and elected to have the case filed in the Southern District of New York.

Gary Kennedy

Based on my first-hand experience managing a large corporate restructuring in a distant locale, it is my view that Congress should amend the bankruptcy laws and eliminate venue shopping. U.S. corporations should be required to file bankruptcy cases in their hometown jurisdiction.

The selection of venue for the company's bankruptcy filing was a hotly debated topic between me and the company's outside legal advisors.

Under current bankruptcy rules, a debtor is authorized to file in its state of incorporation, its principal place of business, or where one or more of its affiliates conducts business. Under these rules, a debtor need only have a tangential relationship to its preferred venue.

Given the broad venue selection rules, we narrowed our choices to two locales – Dallas/Fort Worth (our principal place of business) and New York City (the location of a company affiliate).

I strongly favored a Texas filing. The Dallas/Fort Worth metroplex is American's home base, with more than 20,000 local employees, consisting of pilots, flight attendants, mechanics, ticket agents, and headquarters staff. The area is also home to thousands of retirees.

A filing in DFW would afford employees and retirees easy access to the courthouse, allowing them to attend and participate in court hearings. As one of the largest employers in North Texas, I was confident that a Texas judge would work hard to ensure that we successfully reorganized our business.

Conversely, our outside legal team advocated in favor of a New York venue. Their argument focused on three factors.

- First, they believed that courts in the Southern District of New York were more sophisticated and better able to manage a large and complex corporate restructuring.

- Second, they suggested that the case law in the Second Circuit Court of Appeals (which includes New York) was much better developed and more favorable to a debtor than the case law in the Fifth Circuit Court of Appeals (which includes Texas).

- Third, they claimed that the vast majority of attorneys, financial advisors, and bankers were located in New York City, thereby affording the debtor greater efficiency and reduced travel costs.

Reluctantly, I concurred with their reasoning and we filed the proceeding in New York City.

While one can argue the merits of the arguments in favor of a filing in a "mature" jurisdiction, this argument runs contrary to a core principle underlying the Bankruptcy Code.

The Bankruptcy Code is intended to be applied uniformly across all 50 states. Further, I have not seen any evidence to support the notion that judges and practitioners in Dallas are less sophisticated or less able to handle complex Chapter 11 reorganization cases.

More importantly, the Bankruptcy Code's broad venue selection provisions are fundamentally unfair to employees, retirees, and local constituents. Allowing a debtor to file for bankruptcy in a far-flung jurisdiction significantly impedes access to justice.

A bankruptcy proceeding, by its very nature, is one that carries extraordinary consequences for company employees and retirees. They deserve the opportunity to observe and participate in court proceedings. That opportunity is substantially diminished if the proceedings are held in a remote jurisdiction, one whose access is beyond the reach of most employees and retirees.

The American Airlines bankruptcy proceeding, like so many bankruptcies involving large corporations, was a contentious and emotionally charged affair. Ours continued for more than two years.

During that time, it was difficult for employees or retirees to attend even a single court proceeding. The travel costs alone (despite reduced employee air fare costs) proved prohibitive for all but a fraction of the employee/retiree base. For all practical purposes, they were denied access to the proceedings.

If the bankruptcy case had been prosecuted in American's hometown, there is little doubt that the proceeding would have resulted in a successful reorganization (as it did in the chosen New York venue).

As the company's top lawyer, and with the future of the company at stake, I would have taken great comfort being in our hometown as we wrangled with difficult and emotionally charged issues as our case wound its way through the bankruptcy process.

It is time for a change. Senate Bill 2282, introduced by Senator John Cornyn (R-TX) and Senator Elizabeth Warren (D-MA) would substantially narrow venue choices for companies that file Chapter 11 cases.

The proposed legislation would allow companies to file only where their principal place of business or assets are located. The legislation would foreclose the opportunity to file in a company's state of incorporation and it would eliminate the affiliate-filing loophole.

I am confident that the proposed legislation is unpopular in New York and Delaware courts and among its bankruptcy practitioners. Nevertheless, employees, retirees, and others affected by a company's bankruptcy filing have the right to be heard and to participate in the Chapter 11 process. Eliminating venue shopping will assure them of that access.

Gary F. Kennedy is the former General Counsel of American Airlines, and author of the new book, Twelve Years of Turbulence, the Inside Story of American Airlines' Battle for Survival.

Link to Judge Rhodes' Video

https://swm.wistia.com/medias/aajf0r5bs6

III.

Bankruptcy Preferences Reform

CLLA HILL DAY

February 25, 2019

BANKRUPTCY PREFERENCE REFORM

1) PROPOSAL

Provide for a mechanism to ensure that preference actions are filed in good faith; allow for a safe harbor for pre-bankruptcy consensual settlements with the debtor; and also require that actions for the recovery of $50,000 or less be commenced where the preference defendant resides.

2) BACKGROUND

Although the Code's preference statute has achieved, for a large part, the balance it sought to strike between *creditors*, it has produced an uneven playing field as between creditors and a trustee or debtor-in-possession allowing the latter to, in essence, hold a creditor hostage by requiring that the creditor either agree to a significant judgment in settlement or spend even greater costs in litigating the preference claims in proving up its defenses. In both large and small bankruptcies, trustees or debtors-in-possession commonly issue preference demands to, or commence adversary proceedings against, every unsecured creditor who received a payment from the debtor within 90-days prior to bankruptcy filing with little to no analysis at all on the part of the trustee or debtor in possession regarding the circumstances surrounding the payment or transfer or whether any of the applicable defenses apply. Even the defense of a small preference claim can be unduly expensive causing creditors to unnecessarily negotiate a settlement in compromise of the asserted claims.

3) WHY PREFERENCE REFORM IS NECESSARY

Quite often, the only significant connection that a creditor has with a bankruptcy case is when it is contacted to disgorge a preferential payment. At first glance, the trustee or debtor-in-possession's action seems completely unfair and arbitrary, only increasing the creditor's other losses caused by the debtor. Thus it is imperative for the bankruptcy process and system that avoidance actions, especially preferences, are conducted fairly and with an eye toward advancing the main purpose of the law – the equality of treatment of similarly situated creditors. However, in practice that has not always been the case and has resulted in "strong frustrations with preference law." *American Bankruptcy Institute Commission to Study the Reform of Chapter 11 (2012-2014)* (the "ABI Report") p. 150).

4) **SUGGESTED REFORM**

The CLLA recommends the following reform measures to 11 U.S.C. § 547 and 28 U.S.C. § 1409(b) regarding the treatment of preferential transfers claims:

A. **First, the CLLA recommends that 11 U.S.C. § 547(c) be amended to provide an additional affirmative defense to creditors that cooperate and settle with a debtor before a bankruptcy case is filed.**

- At the May 21, 2013 Public Field Hearing held by the ABI Commission to Study the Reform of Chapter 11, Valerie Venable, CCE, Director of Credit, Ascend Performance Materials, LLC, Houston Texas highlighted through her testimony the need for bankruptcy reform as it relates to creditor cooperation with a financially troubled debtor and the disincentive that exists to help a troubled debtor, for fear that the assistance will only result in a bankruptcy preference suit later. Ms. Venable stated:

- "I sell raw material, used in manufacturing – little plastic pellets that go into everything from underwear to carpet to tires. When a customer of mine has financial difficulties, it is not uncommon for me to work out a deal with the debtor which allows them additional time to pay me, either as it sells my goods, or with a repayment plan that allows the debtor funds to run their business through a period of temporary cash flow constraints. This not only helps the debtor keep the lights on, but also allows my company to continue to build a strong business relationship. In all honesty, sometimes this strategy pays off, but sometimes I just end up with a higher balance due or opening myself up for a potential preference exposure should the debtor ultimately fail. Because of the fear that a payment will have to be given back, some creditors, in order to preserve their own company's assets, will make a business decision not to continue to sell to a troubled business rather than try to find a way to get them enough product to keep them in business. This lack of willingness to work with the debtor may protect the creditor, but may also serve as a catalyst to eventual business failure." (Id., p.3).

- Ms. Venable went on to testify as follows: "Yet, the whole time I am working with the debtor, allowing slower payments, in order to keep the debtor in business, I have to keep weighing the potential impact of a subsequent Chapter 11 or Chapter 7, where a demand for repayment will be made to me because those payments were not "ordinary". Even a formal adjustment of terms for a quantifiable valid business reason has

worked against me. When I receive the letter asking for recovery of a preference, or worse, a notice of a complaint being filed, I am presumed guilty until proven innocent. And to prove my innocence is going to be costly and time consuming and in some cases more risky than selling to the distressed debtor." (Id., pp. 3-4).

SUGGESTED LEGISLATIVE LANGUAGE: Amend 11 U.S.C. § 547(c) by (1) inserting a new paragraph (c)(5) as follows: "*(5*) to the extent that such transfers are made by the debtor in performance of obligations created by a written agreement between the debtor and creditor in settlement or adjustment of an antecedent debt," and (2) renumbering the subsequent paragraphs after § 547(c).

B. **Second, the CLLA recommends that Section 547 be amended to require that the trustee or the debtor-in-possession "meet and confer" with the creditor both prior to and as a condition of the filing of any adversary proceeding against the creditor seeking the recovery of an alleged preferential transfer. This "meet and confer" requirement would further require the trustee or debtor in possession to provide the creditor with financial information relevant to the claim and possible defenses to the alleged preference claim.**

- The *American Bankruptcy Institute Commission to Study the Reform of Chapter 11 (2012-2014)* recommends that demand should not be issued or a complaint be filed unless "based on reasonable due diligence, the trustee believes in good faith that a plausible claim for relief exists against such party under section 547, taking into account the party's known or reasonable knowable affirmative defenses under section 547(c)." ABI Report at p. 148.

- The *National Association of Credit Management Introduction and Position Brief 2015* contains the following recommendation regarding this issue: "NACM and the trade credit community believe there should be a requirement that the trustee conduct due diligence to determine whether a preference claim exists before making demand upon a creditor." NACM recommends that a "due diligence" threshold be incorporated in to Section 547 (b), as a prerequisite to the filing of any preference action. NACM has proposed that "due diligence" mean "a determination by the trustee that there are reasonable grounds to believe, in good faith, that a plausible claim for avoidance exists after taking into account the known or reasonably ascertainable defenses under 547(c) and should include a "new value" analysis for the purposes of Section 547(c)(1) and Section

547(c)(4) and an ordinary course of business analysis for the purposes of Section 547(c)(2)." (Id., p.2).

SUGGESTED LEGISLATIVE LANGUAGE: Section 547(b) of title 11, United States Code, is amended by inserting ''based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subsection (c),'' after "may".

The immediately foregoing language is identical to the change made in H.R. 7190, introduced in the House in the immediately prior term.

C. **Third, the CLLA has two inter-related recommendations as to venue in preference actions for *de minimis* amounts: First, the CLLA recommends changing the dollar limits in 28 U.S.C. § 1409(b) from the current amount of $12,850 to $50,000 on a non-insider commercial preference claim; preference actions less than $50,000 could only be brought in the federal district where the creditor/defendant resides, rather than in the district where the bankruptcy case is pending. Second, the CLLA recommends a technical modification of 28 U.S.C. § 1409(b) to clarify that *de minimis* preference claims be brought solely in the federal district where the creditor/defendant resides. As to the jurisdictional amount:**

- Prior to BAPCPA, the venue for any action related to a bankruptcy case was proper in the bankruptcy court where the bankruptcy case was proceeding. This resulted in unfairly compelling creditors to defend suit for *de minimis* amounts being sued in faraway jurisdictions, effectively coercing creditors to settle such claims. BAPCPA sought to curb this abusive practice by creating a venue provision to require actions for *de minimis* amounts be filed in the federal district where the creditor/defendant resides – rather than in the district where the bankruptcy case is pending.

- The *National Bankruptcy Review Commission, The Next Twenty Years (1997)* reviewed various surveys of attorneys and credit managers regarding preference experiences and acknowledged that smaller trade creditors are particularly susceptible to abusive litigation tactics by the trustee or debtor-in-possession. (*Id*., p. 797).

- Subsequently, in the *American Bankruptcy Institute Commission to Study the Reform of Chapter 11 (2012-2014), the* Commission reported that it had held special hearings on preferences and determined that often

preference actions were filed without regard to the merits of the claim and were actually designed more to extract settlement payments from a defendant than to pursue the merits of the claim (*Id*., p. 150).

- These abuses are highlighted especially in larger Chapter 11 cases that are filed in remote bankruptcy locations. There a preference defendant will be often be stuck with a "Hobson's Choice", i.e., to have local counsel defend the litigation or to pay for a settlement to quickly resolve the matter before attorneys' fees surpass the prayer of the complaint. It is estimated that at least $50,000 must be at issue to justify hiring local counsel to defend an out of state action. (*See ABI Commission Report*, which also recommends a $50,000 threshold).

As to the technical modification of 28 U.S.C. § 1409(b):

The relevant venue statute is 28 U.S.C. § 1409, provides as follows:

Venue of proceedings arising under title 11 or arising in or related to cases under title 11

(a) Except as otherwise provided in subsections (b) and (d), a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending.

(b) Except as provided in subsection (d) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case to recover a money judgment of or property worth less than $1,300 or a consumer debt of less than $19,250 or a debt (excluding a consumer debt) against a noninsider of less than $12,580, only in the district court for the district in which the defendant resides.

(The foregoing figures are adjusted every three years according to section 104 of Title 11, and are due for adjustment soon.)

- Bankruptcy courts have regularly ruled that the plain language of this statute defeats the Congressional intent. The language of the two sections is not completely parallel and courts have held that preference actions under §547 do not "arise in" or "related to" the bankruptcy case, as the exception in subsection (b) anticipates, but instead "arise under" the Bankruptcy Code and are covered by subsection (a). Courts find that the clear language of the statute contradicts the position of creditor/defendants – language which clearly did not accomplish what Congress set out to do.

- A couple of courts have held that Congress unintentionally omitted "arising under" from subsection (b) but the majority have held that they do not need to consider the intent of Congress because there is no ambiguity in the language of

the statute. On January 11, 2019, the Bankruptcy Court in Idaho became the latest to find that there is no restriction on the venue for filing preference actions, in a case involving $11,000. That ruling required a Los Angeles company to appear in Idaho bankruptcy to defend an $11,000 preference case.

SUGGESTED LEGISLATIVE LANGUAGE: The Commercial Law League of America proposes that a simple technical correction to the statute be enacted to bring the language of the statute in line with Congress' intent by making the language in subsections (a) and (b) parallel: **"(b) Except as provided in subsection (d) of this section, a trustee in a case under title 11 may only commence a proceeding arising under title 11 or arising in or related to a case under title 11 to recover a money judgment of or property worth less than $1,300 or a consumer debt of less than $19,250 or a debt (excluding a consumer debt) against a noninsider of less than $50,000, only in the district court for the district in which the defendant resides."**

The first two figures are to be adjusted every three years, according to section 104 of Title 11.

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IV.

Creditors' Rights FDCPA

Comment of the Commercial Law League of America
Submitted to the United States Congress in Support of
The Practice of Law Technical Clarification Act of 2018

February 7, 2019

Introduction

The Commercial Law CLLA of America ("CLLA"), founded in 1895, is the nation's oldest organization of attorneys and other experts in credit and finance actively engaged in the fields of commercial law, bankruptcy and reorganization. The CLLA has long been associated with the representation of creditor interests, while seeking fair, equitable and efficient treatment of all parties in interest. CLLA members can be found in every state across America and in many foreign countries. The CLLA regularly submits policy papers to Congress and CLLA members have testified on numerous occasions before Congress as experts in fields related to creditor interests.

Background

In 1977 Congress enacted the Fair Debt Collection Practices Act, ("FDCPA") with the intent, among other things, to protect consumers from certain actions of third-party debt collection professionals. In 1986 the FDCPA was expanded to encompass licensed attorneys and law firms. This expansion was redundant, in that attorneys were (and still are) governed by Local Court Rules and Procedures that provide protections and relief to litigants for alleged attorney overreach or abuses. For example, litigants can seek "Rule 11" sanctions against attorneys for misconduct during litigation in every jurisdiction. But for the collection attorney who files a consumer debt action, he or she is guided by "Rule 11" and the strict standards within the FDCPA. Under the FDCPA, an attorney who makes any error, regardless of intent, while engaged in litigation with a consumer debt action can be sued in Federal Court.

The purpose of this comment is to confirm the CLLA's support for H.R.5082 – the Practice of Law Technical Clarification Act of 2018 ("PLTCA")[1] which excludes law firms and licensed attorneys from the definition of a debt collector under the FDCPA when engaged in activities related to legal proceedings **and** prevents or limits the Bureau of Consumer Financial Protection ("BCFP") from exercising supervisory and enforcement authority when law firms or licensed attorneys take certain actions in legal proceedings.

[1] On February 23, 2018, Representative Alexander Mooney (R- W.Va.) introduced the "Practice of Law Technical Clarification Act of 2018" (H.R. 5082)

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CLLA Comment

1. H.R. 5082 PROVIDES A NARROW FDCPA EXEMPTION TO LICENSED ATTORNEYS ENGAGED IN ACTUAL LITIGATION FOR COLLECTION ON A CLIENT'S BEHALF

The FDCPA applies only to third-party debt collectors, which are defined as ''any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.''[2] When the FDCPA was enacted in 1977, attorneys collecting debts on behalf of clients were exempted from the definition of ''debt collector.'' However, in 1986 Congress amended the FDCPA to remove the attorney exemption, and in doing so claimed to allegedly ''close a significant loophole.''[3] As a result, there are certain instances in which attorneys will be considered debt collectors and subject to compliance with the FDCPA. Current legal interpretation considers a lawyer who regularly tries to obtain payment of consumer debts through litigation to be a person who ''regularly collects or attempts to collect . . . debts owed'' in the definition of debt collector.[4]

The CLLA believes that H.R. 5082 eliminates the perceived harms or the "loophole" cited by opponents, because it excludes licensed attorneys from the definition of a debt collector when engaged in the practice of active litigation and legal services. Specifically, H.R. 5082 proposes amendments to Section 803(6) of the FDCPA (15 U.S.C. 1692a(6)), as follows:

"(F) any law firm or licensed attorney, to the extent that—
(i) such firm or attorney is engaged in litigation activities in connection with a legal action in a court of law to collect a debt on behalf of a client, including—
(I) serving, filing, or conveying formal legal pleadings, discovery requests, or other documents pursuant to the applicable statute or rules of civil procedure;
(II) communicating in, or at the direction of, a court of law (including in depositions or settlement conferences) or in the enforcement of a judgment; or

[2] 15 U.S.C. § 1692(a)(6).

[3] H.R. Rep. No. 405, 99th Cong. 2d Sess. 3–6, *reprinted in* 1986 U.S. Code Cong & Ad. News 1752, 1753–57. ''The purpose of the amendment was . . . to close a significant loophole, whereby attorneys engaging in traditional debt collection activities were able to avoid the FDCPA's precepts merely by virtue of the fact that they had, at some point, obtained a law degree.'' *Firemen's Ins. Co v. Keating*, 753 F. Supp. 1137, 1142 (S.D.N.Y. 1990).

[4] Section 803(6) of the Fair Debt Collection Practices Act (15 U.S.C. 1692a(6)).

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(III) any other activities engaged in as part of the practice of law, under the laws of a State in which the attorney is licensed, that relate to the legal action; and (ii) such legal action is served on the defendant debtor, or service is attempted, in accordance with the applicable statute or rules of civil procedure;"

H.R. 5082 is a logical and necessary step for clarifying and restoring the intent of the FDCPA to stop abusive debt collection practices, while permitting licensed attorneys to practice law without the threat of federal litigation in matters that are pending before state courts. H.R. 5082 reinforces the clear differences between active litigation and debt collection, and clearly illustrates the parties that can engage in active litigation. Further and importantly, H.R. 5082 would not disturb consumer protections for debt collection outside of active litigation.

2. **THE CLLA SUPPORTS LEGISLATION THAT ELIMINATES THE BCFP FROM EXCERCISING SUPERVISORY AND ENFORCEMENT AUTHORITY OVER LICENSED ATTORNEYS IN CERTAIN ACTIONS IN LEGAL PROCEEDINGS**.

Title X of the Dodd-Frank Act gave the BCFP expansive supervisory authority of debt collection. In addition, the Dodd-Frank Act transferred FDCPA enforcement and rulemaking authority to the BCFP. Section 1027(e) of the Dodd-Frank Act exempts most consumer lawyers from the BCFP's authority, but not all creditor lawyers. Currently, the provision has been interpreted to treat an attorney representing a creditor in a legal action against a debtor as having "offered or provided " a financial product or service. Thus, an attorney representing a creditor that sues a debtor is considered to be providing financial products or services, and the BCFP may exercise its powers against said attorneys accordingly.

H.R. 5082 eliminates the duplicitous layer of enforcement at the federal level and returns oversight and enforcement to the state and local levels. Specifically, H.R. 5082 proposes amendments to 12 U.S.C. 5517 (e)(2)(B), as follows:

"[.], unless such financial product or service is provided by a licensed attorney who is not a debt collector as described under section (803)(6)(F) of the Fair Debt Collection Practices Act.

By removing unnecessary federal oversight of licensed attorneys, H.R. 5082 will stop claims against licensed attorneys in federal court for technical FDCPA violations, when they are engaged in active litigation matters. In addition, it will provide clarity to credit grantors and others who regularly seek judicial intervention to collect bad debt through litigation. Importantly, debtors will not lose protection either, because they can seek relief while engaged in litigation with court rules, procedures, defenses and court order to counter or address any attorney misconduct. Further, there would be no disruption to existing rules and procedures that best suit for and have established ethical rules and enforced disciplinary action for attorneys.

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Conclusion

H.R. 5082 preserves the FDCPA's protections for consumers, logically clarifies the definition of "debt collectors" in the FDCPA and Dodd-Frank Act for licensed attorneys engaged in active litigation matters, and eliminates unnecessary federal regulation of licensed attorneys.

Proposals

The CLLA supports the technical changes to the FDCPA and Dodd-Frank Act as set forth in H.R. 5082 - the Practice of Law Technical Clarification Act of 2018, and referenced herein.

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